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JAMES NELS EKBERG,
v.
RICHARD A. McGEE, ET AL.,

Appellant,
Appellees.

DORIS H. MAIER
Deputy Attorney General of the
State of California

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No. 12709

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NELS EKBERG,

Appellant,

v.

RICHARD A. McGEE, ET AL.,

Appellees.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The appellant herein transmitted to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, an application for a writ of habeas corpus. Judge Denman, pursuant to 28 U. S. C., 2241(b), transferred said application to the United States District Court for the Northern District of California (Tr. 47). The Honorable Dal M. Lemmon, judge of said court, by an order filed July 31, 1950, denied to appellant the right to file the petition *in forma pauperis* on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar

urgency," which entitled him to the issuance of the writ (Tr. 48).

On August 18, 1950, appellant filed an application for certificate of probable cause and appeal from the order denying hearing and issuance of a writ of habeas corpus and the denial of the right to file the petition for a writ of habeas corpus and to proceed *in forma pauperis* (Tr. 54-55). Thereafter, and on August 24, 1950, a document entitled "Assignment of Errors" was filed by appellant in the United States District Court for the Northern District of California (Tr. 56-57), as well as a praecipe for the certified records (Tr. 58-59).

On September 27, 1950, Honorable Dal M. Lemmon, United States District Judge, ordered that the time for docketing the appeal in the Court of Appeals for the Ninth Circuit be extended to and including the twenty-seventh day of October, 1950 (Tr. 60). Thereafter, and on October 12, 1950, the record in the above matter was filed with this court.

APPELLANT'S SPECIFICATIONS OF ERROR

The opening brief of appellant adopts as the specifications of error, the points raised in the previous documents filed by appellant, namely, in the petition for writ of habeas corpus, and brief "as supplement to and in support of appeal of the petition for the writ of habeas corpus ad subjiciendum, ad testificandum."

These grounds may be summarized as follows: (1) The alleged prior conviction with which the petitioner and appellant was charged was not a valid conviction and the trial court therefore lacked jurisdiction; (2) there was insufficient evidence to justify petitioner and appellant's conviction pursuant to Section 476a of the Penal Code of the State of California, and there was insufficient evidence before the committing magistrate to justify petitioner and appellant's being held for trial; (3) the joinder of two separate informations for trial resulted in the denial to petitioner and appellant of due process of law; (4) petitioner and appellant was deprived of counsel of his own choice and his counsel was grossly incompetent; (5) he was denied defense witnesses, which resulted in the denial of due process of law as to appellant; (6) he was placed twice in jeopardy for the same offenses; and (7) he was denied an opportunity to appear in person and argue his cause by the District Court of Appeal of the State of California, and denied the right to have counsel appointed to represent him on his appeal, which resulted in a lack of due process.

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

In the case of *Dorsey v. Gill*, 148 F. 2d 857 (cert. denied 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at

great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The opinion, which is exhaustively annotated, summarized the procedure which may be followed by a district court on a petition for the issuance of a writ of habeas corpus and states (pp. 865-866):

“There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is

involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once.”

From the record of the proceedings heretofore had in this matter (*People v. Ekberg*, 94 Cal. App. 2d 613; 211 P. 2d 316) and of which this court may take judicial notice (*Knight v. People*, 60 F. Supp. 164), it appears that defendant was charged in the state courts with the crime of issuing a check without sufficient funds with intent to defraud. In a separate action he was charged with the crime of possession of a firearm capable of being concealed upon the person of one previously convicted of a felony. He pleaded not guilty and not guilty by reason of insanity in each action. At his request the actions were consolidated for trial and tried together. A jury found

him guilty on both charges and later the same jury found him sane at the time each of the offenses was committed. Separate judgments were entered. The appellant herein was represented by counsel at the time of the trial but filed an appeal in *propria persona* only under the number of the cause involving the possession of a firearm. However, his argument that he intended to appeal in both cases was allowed by the court and both matters were considered (*People v. Ekberg*, 94 Cal. App. 2d 613, 211 P. 2d 316).

After a complete review of the case, the District Court of Appeal of the State of California, in and for the Fourth Appellate District, affirmed the judgment on November 14, 1949. Thereafter, a petition for rehearing was filed with said court, which was denied on November 26, 1949, and a petition for hearing was denied by the Supreme Court of the State of California on December 12, 1949 (*People v. Ekberg*, 94 Cal. App. 2d 613, 619, 211 P. 2d 316). No petition for certiorari was filed with the United States Supreme Court seeking a review of this matter.

On February 15, 1950, appellant herein filed a petition for writ of habeas corpus with the California Supreme Court, which was numbered therein Crim. 5086, in which the same points as presented herein were sought to be raised. This petition was denied without opinion by the California Supreme Court on March 16, 1950. Thereafter appellant filed a petition for certiorari with the United States Supreme Court, which was denied on June 9, 1950 (339 U. S. 969).

The petition on its face in the instant matter presents no grounds which have not been presented hitherto in the actions filed by appellant and no grounds which were not within his knowledge at the time of the original appeal in the State courts.

Salinger v. Loisel, 265 U. S. 224, 230, 44 S. Ct. 519;

Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587.

It is apparent that it does not comply with the provisions of Section 2244, Title 28, United States Code. (Set forth in Appendix.)

Under the provisions of Section 2254, Title 28, United States Code:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”

It would appear that notwithstanding the order of the United States District Court in this matter that the appellant herein has not exhausted the remedies available through the state courts. Appellant still

has the right to raise all points attempted to be presented, in the courts of California by means of a petition for writ of habeas corpus which is an available state corrective process.

Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 176-7;

Smyth v. Stonebreaker (4 Cir.), 163 F. 2d 498, 501.

There is no showing made on the face of the petition that there were any circumstances rendering such process which is available in the courts of California ineffective to protect the rights of the prisoner.

Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587.

In the recent case of *In re Swain* (1949), 34 Cal. 2d 300, 209 P. 2d 793, in denying a petition for writ of habeas corpus to secure the release of a prisoner from custody, the California Supreme Court stated:

“It should be noted that no question of the abuse of the writ of habeas corpus is before us (cf., *Price v. Johnston* (1947), 334 U. S. 266, 286 (68 S. Ct. 1049, 92 L. Ed. 1356)), and that our determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (cf., *Pyle v. Kansas* (1942), 317 U. S. 213, 216 (63 S. Ct. 177, 87 L. Ed. 214); *Williams v. Kaiser* (1944), 323 U. S. 471 (65 S. Ct. 363, 89 L. Ed. 398); *Tompkins v. Missouri* (1944), 323 U. S. 485 (65 S. Ct. 370, 89 L. Ed. 407); *Rice v. Olson* (1944), 324 U. S. 786 (65 S. Ct. 989, 89 L. Ed. 13677)). We are entitled to and we do

require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.”

It should be noted that appellant herein did not petition the United States Supreme Court for certiorari from the decision in *People v. Ekberg*, 94 Cal. App. 2d 613, 211 P. 2d 316, and each of the points raised in the instant petition could have been brought to the court’s attention on the original appeal from the judgment of conviction.

Petitioner, herein, in both his petitions in the state courts and in the federal courts has resorted to vague conclusions and accusations unsupported by facts and the United States District Court did not err in denying him the right to file such a petition.

Tate v. Heinze (9 Cir.) No. 12711, decided Jan. 30, 1951.

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

Although appellant herein was represented by counsel at the trial of his original action, on the appeal

in the state courts and in the habeas corpus proceedings he appeared in *propria persona*. On this appeal, however, counsel has been appointed by this court to represent him.

The majority of the points raised in the petition for writ of habeas corpus filed in this court and the supplemental briefs in support thereof have previously been considered by the state courts and have been held to be without merit.

In *Darr v. Burford*, 339 U. S. 200, 218, 70 S. Ct. 587, 597, the United States Supreme Court stated:

“A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a federal court’s intervention to protect the rights of the accused. The petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist.”

Appellant contends that the judgment and commitment under which he is now confined in Folsom State Prison, California, is void on the various grounds set forth and summarized in the Specification of Errors, *supra* (p. 11).

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR

With relation to appellant's first contention that the trial court had no jurisdiction because the allegation in the information as to his prior conviction was not sustained, this point was fully considered by the District Court of Appeal of the State of California, in and for the Fourth District, in *People v. Ekberg*, 94 Cal. App. 2d 613, 617-18, 211 P. 2d 316, wherein the court stated:

"The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, 'Impersonation of a U. S. Officer,' with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is 'illegal and void' since it developed at the trial that this former judgment had actually been reversed in the case of *Ekberg v. United States*, 167 F. 2d 380. When the district attorney attempted to introduce evidence that the appellant had been previously convicted as alleged in the information appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at Leavenworth and at

Atlanta; and 'that said judgment has never since been reversed, annulled or set aside.' An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had 'not a thing' to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stimulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection."

With relation to the second point raised—that the information failed to charge an offense under the provisions of California Penal Code, Section 476a, that the evidence was insufficient to support the verdict, and that the committing magistrate was without jurisdiction to hold petitioner—these points were fully covered by the District Court of Appeal of the

State of California, in and for the Fourth Appellate District (*People v. Ekberg*, 94 Cal. App. 2d 613, 615-16), wherein it is stated:

“The general facts relating to these cases are as follows. On the afternoon of February 14, 1949, the appellant entered Hancock’s Flower Shop in San Diego, represented himself to be connected with the TWA Airlines, and ordered three orchid corsages saying they were for airline hostesses. He also placed a telegraph order for flowers to be delivered to his wife in Kansas City, giving her correct address. In payment therefor he wrote a check for \$19.82 on a Los Angeles bank. He then stated that the address he had placed on this check was wrong and at his request Hancock tore up that check, and filled out another check on the same bank, with a different address. Both of these addresses were fictitious. The appellant signed the second check and left the store taking the three boxed orchids with him. Hancock saved the pieces of the first check. Having become suspicious, he phoned the Los Angeles bank and learned that the appellant had no account there, a fact which was conclusively established at the trial.

“About 2:30 a.m. on the morning of February 15, 1949, the appellant, while in a grill in San Diego, displayed a pistol in a manner which alarmed the cashier. She called the police and when they arrived they found a .380 Colt automatic pistol under the appellant’s belt and covered by his coat. At that time there was no clip in the gun or shell in the chamber. However, a clip for the gun was found in his pocket. The appellant

told the officers that he had bought the gun a good many years ago.

“A number of points first raised by the appellant are to the effect that the evidence is not sufficient to sustain the verdict and judgment as to either charge. With respect to the check charge, it is argued that the evidence discloses that Hancock was not deceived or defrauded since he knew that the check was no good and did not send the flowers to the appellant’s wife, and since he knew that the appellant was too drunk to know what he was doing; that Hancock did not endorse or deposit the check or deliver the flowers since he knew before he took it and before the appellant left the store that it was worthless; and that the check was actually presented to the bank by a notary public, and went to protest, some 30 days after the information was filed in that case. These contentions are based upon a part of the evidence and inferences the appellant would draw from portions thereof. There is, however, ample evidence as to every element essential to this charge. While Hancock’s testimony discloses that he became suspicious and had some doubts about the matter before the appellant left the store, it also appears that he did not know that the check was not good, that he did not want to accuse the appellant in that manner, and that ‘I thought it was all right.’ Not only is this interpretation of his testimony a reasonable one, but it is supported by the fact that he permitted the appellant to leave with the boxed orchids, the main part of the purchase. His failure to send the remaining flowers to the appellant’s wife occurred later, after

he had learned that the check was worthless. While Hancock admitted that the appellant appeared to him at the time to be 'pretty well inebriated' and not 'in too good condition,' the evidence is far from showing that the appellant was so drunk that he did not know what he was doing or that Hancock was aware of any such fact. The appellant was able to write out the first check, giving the false address thereon, to instruct Hancock to fill out another check with a different false address upon it, and to give his wife's correct name and address in Kansas City. Moreover, it is the appellant's intent which is the most important consideration. The actual presentation of the check by Hancock was unnecessary, under the circumstances, and it was presented by the notary about two weeks before the information was filed. These were questions of fact for the jury and its findings thereon are sufficiently supported by the record.

"With respect to the possession of a firearm charge it is argued that the alleged weapon was not a 'deadly weapon' since it was 'in disassembled form,' with 'parts missing,' and without bullets or cartridges. Section 2 of what is known as the 'Dangerous Weapons' Control Law' (Stats. 1923, p. 695; 1 Deering's Gen. Laws, Act 1970) forbids the possession of certain firearms by one who has been convicted of a felony under the laws of the United States, of the State of California or of any other state or country. There is no evidence that any part of this automatic pistol was

missing. While the clip was not in the gun the appellant had it in his pocket. The appellant concedes that the barrel of this gun was less than 12 inches in length, and it was stipulated at the trial that the weapon was 'capable of being fired,' and that it was meant thereby that if a shell had been in the gun at the time the gun would properly discharge the shell. The evidence is sufficient in this respect."

It has long been the settled rule that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ.

Burall v. Johnson, 134 Fed. 2d 614, cert. den., 63 S. Ct. 1327, 319 U. S. 768, Rehearng Den., 64 S. Ct. 30, 320 U. S. 810, Rehearing Den., 64 S. Ct. 187, 320 U. S. 812;

Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588;

Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582.

With relation to appellant's contention that he was deprived of counsel of his own choice or that his counsel was incompetent, it is apparent to this court that this point could have and should have been raised on appeal from the original judgment. Moreover, there are no facts set forth which would tend to disclose the truth of this allegation or show that at any time petitioner raised this matter in his original proceedings in the state courts.

With relation to appellant's contention that he was denied the presence of defense witnesses because of

the incompetency of his counsel, it is apparent that the failure of counsel to present evidence does not constitute a denial of due process of law and the competency or incompetency of counsel is a question of fact to be passed on by the trial court.

With relation to petitioner's contention that he was twice in jeopardy for the same offense in that the court ordered consolidated the trial on the information for violation of California Penal Code, Section 476a, and the trial for the possession of a firearm capable of being concealed upon the person of one previously convicted of a felony the record shows that this consolidation was made at the request of the appellant herein and he may not now attack such joinder (*People v. Ekberg*, 94 (A. 2d 613, 211 P. 2d 316)). Moreover, the question of joinder is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate the practice therein.

Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383;

Hurtado v. State of Cal., 110 U. S. 516, 4 S. Ct. 111;

People v. Burton, 91 C. A. 2d 695, 205 P. 2d 1065, Cert. Den. 338 U. S. 886;

Bundte & Phillips v. People of the State of Cal., 87 C. A. 2d 735, 197 P. 2d 823, Cert. Den. 337 U. S. 915.

As to appellant's contention that he was not afforded a probation hearing and that judgment and

sentence were improperly imposed, this point is covered in the district court of appeal's decision in *People v. Ekberg*, 94 Cal. App. 2d 613, at 618-19, wherein the court states:

“The court did not refuse to consider an application for probation. Aside from the fact that the appellant was ineligible for probation, he waived an application for probation immediately after the verdicts were returned on the insanity issue. The facts which the appellant insists could have been brought to light through a probation hearing were fully brought out in a statement made to the court by appellant's counsel. The appellant was not without counsel when judgment was pronounced. Judgment was purportedly pronounced on May 17, with his regular counsel present. It was discovered that he had not been properly arraigned for judgment and, on May 18, this proceeding was set aside and judgment again pronounced. At that time appellant's regular counsel was unable to be present and he was represented by another counsel, with his consent expressed in open court. Bias is attributed to the trial judge in that he remarked that he thought the appellant should have pleaded guilty to these charges. This occurred just before sentence was pronounced and while the judge was reviewing the facts in response to counsel's plea for leniency. The judge referred to appellant's attitude in court and to his record, including more than 50 arrests with 14 of them on charges of a serious nature. In commenting thereon, the judge stated that if the appellant had had the proper attitude of humility he would

have pleaded guilty to these charges. Neither prejudice, bias nor error appears. Complaint is further made that appellant did not receive the transcript in this matter, at the state prison, until more than 90 days after notice of appeal was filed. Because of the situation which developed, this court twice extended the time for filing appellant's opening brief, it was then filed on time, and no prejudice appears."

See:

Williams v. N. Y., 337 U. S. 241.

Appellant's further contention that he was not afforded a proper appeal in that his request to be personally present and argue the matter in the District Court of Appeal was denied as was his request for the appointment of counsel to argue said matter, is without merit. The assistance of counsel on appeal or the right of the petitioner and appellant to be personally present and argue the matter is a question within the discretion of the appellate court and the appellant as a matter of right is not entitled to be produced. The refusal of this right does not involve a lack of due process of law.

Price v. Johnson, 334 U. S. 266.

Appellee submits that whereas in the instant matter the allegations of the petition are not supported by facts and the majority of the points raised have been considered by the state courts and the United States Supreme Court has denied certiorari, in the

absence of exceptional circumstances of peculiar urgency the district court in the exercise of its discretion may deny the petitioner the right to file such petition.

Dorsey v. Gill, 148 Fed. 2d 857, Cert. Den. 325 U. S. 890;

Boyd v. O'Grady, 121 Fed. 2d 246, 147;

Edmondsen v. Wright, 177 Fed. 2d 719;

Holiday v. State of Maryland, 177 Fed. 2d 844;

Holland v. Eidson, 90 F. Supp. 314;

U. S. v. Burke, 90 F. Supp. 868.

It is respectfully submitted that the language of this court in the decision in *Tate v. Heinze* (9 Cir.), No. 12,711, decided January 30, 1951, is directly applicable to the case at bar:

“Unquestionably, petitioner was justly convicted, and the sentence under the state Habitual Criminal Act was justified. In view of the fact that there is no merit in the present petition, the petition to file *forma pauperis* should have been denied without hesitation. We only comment that there was no ground for a certificate of probable cause for appeal. The only reason why such a certificate is justified is the abuse of this process, which has been engendered by some appellate rulings.”

Appellee respectfully submits that the order of the district court denying the right to file the petition

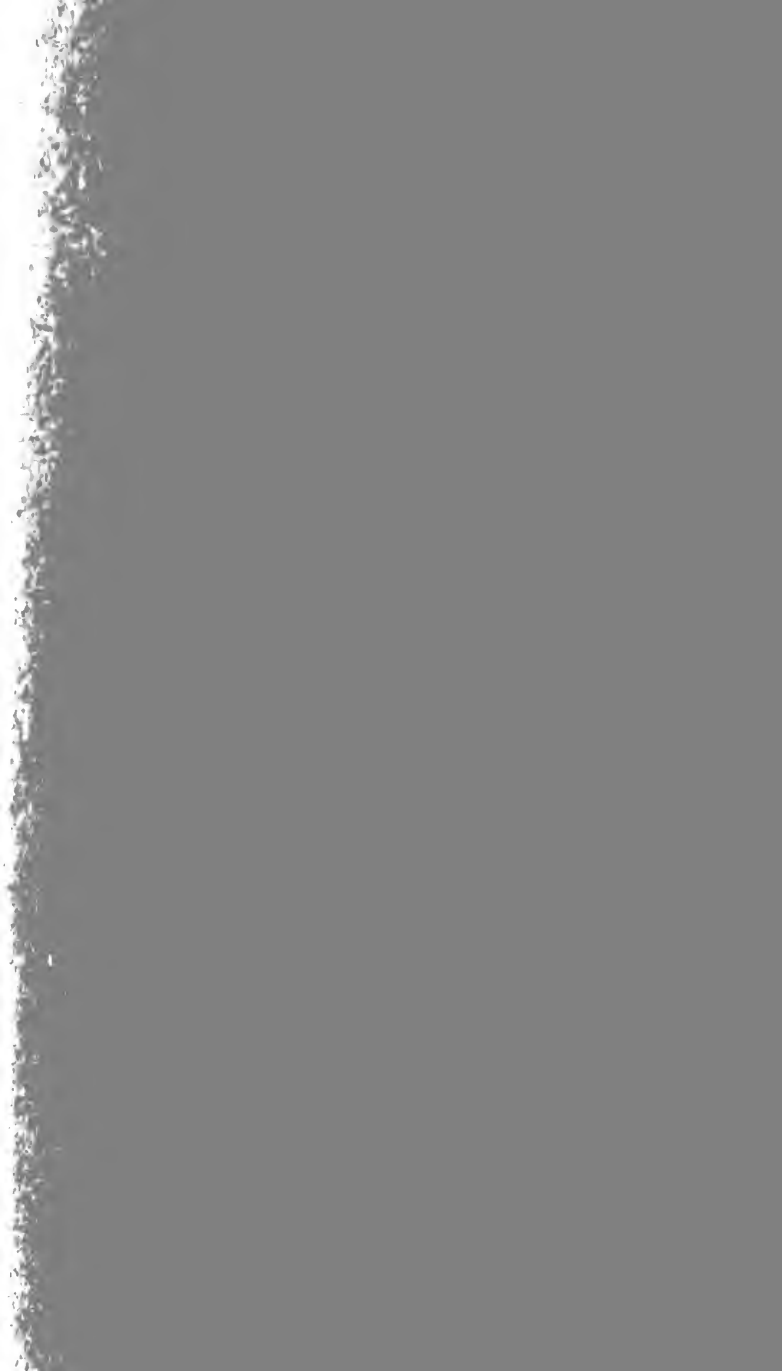
for writ of habeas corpus in the present matter should be affirmed and the appeal dismissed.

Dated: Sacramento, California, February 5, 1951.

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APPENDIX

U. S. Code, Title 28, Sec. 2244

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

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Appellees.

On Appeal From the United States District Court for the
Northern District of California, Northern Division

APPELLEES' PETITION FOR A REHEARING

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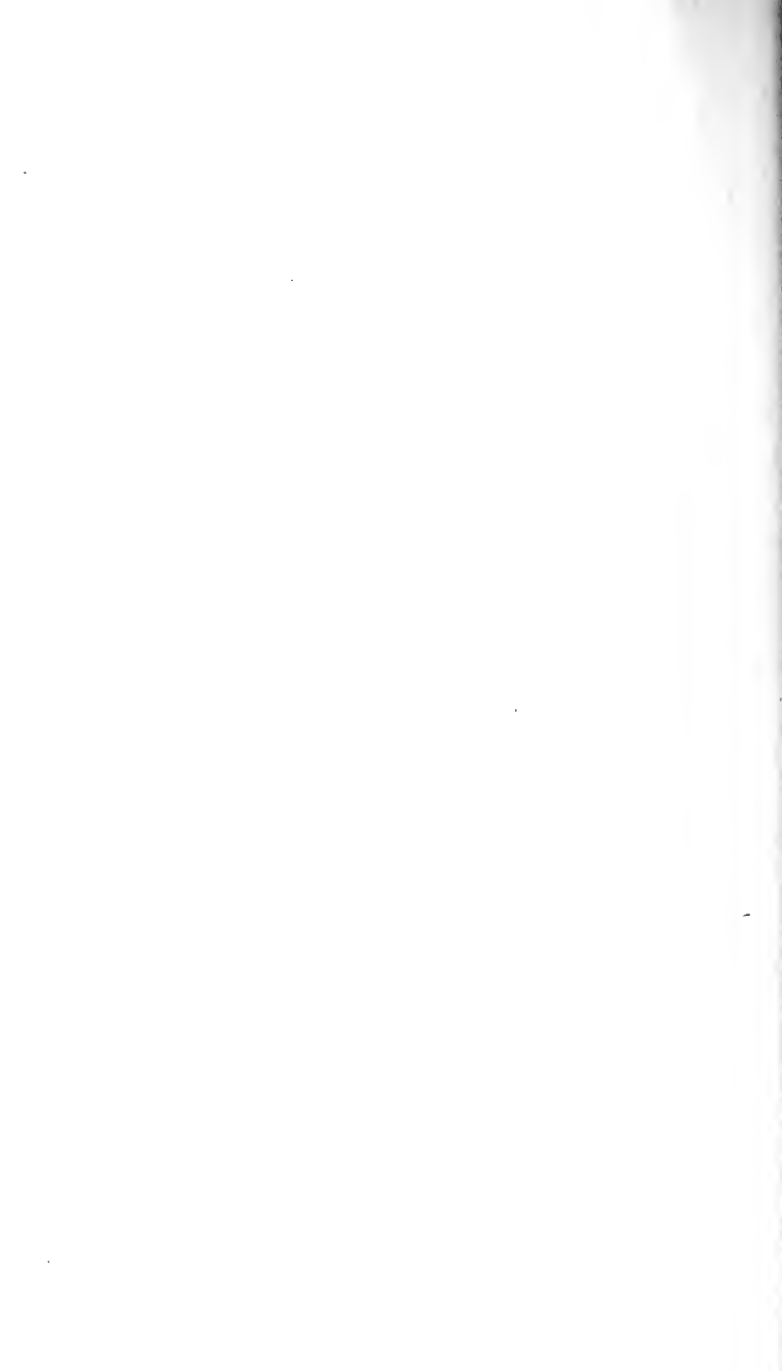
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No. 12709

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES NELS EKBERG,

Appellant,

v.

RICHARD A. McGEE, ET AL.,

Appellees.

On Appeal From the United States District Court for the
Northern District of California, Northern Division

APPELLEES' PETITION FOR A REHEARING

To the Honorable Chief Judge and Circuit Judges:

The appellees herein respectfully petition this court for a rehearing *en banc* in the above-entitled matter on the following grounds:

(1) The decision of this court is in conflict with other decisions of this court, namely, *Huffman v. Smith* (9 Cir.), 172 Fed. 2d 129; *Bird v. Smith* (9 Cir.), 175 Fed. 2d 260 (cert. den. 336 U. S. 954, 93 L. Ed. 1109, 69 S. Ct. 876); *Tate v. Heinze* (9 Cir.), 187 Fed. 2d 98 (cert. den. Misc. 409, Oct. Term, 1950), on the same points of law;

(2) The decision of this court is in conflict with decisions rendered by other circuit courts of the

United States, namely, *Goodwin v. Smyth* (4 Cir.), 181 Fed. 2d 498 (cert. den. 337 U. S. 946, 93 L. Ed. 1748, 69 S. Ct. 1503); *Weber v. Ragen* (7 Cir.), 176 Fed. 2d 579 (cert. den. 338 U. S. 809, 94 L. Ed. 489, 70 S. Ct. 49); *Schechtman v. Foster* (2 Cir.), 172 Fed. 2d 339 (cert. den. 339 U. S. 924, 94 L. Ed. 1346, 70 S. Ct. 613); *Coggins v. O'Brien* (1 Cir.), 188 Fed. 2d 130; and *Stonebreaker v. Smyth* (4 Cir.), 163 Fed. 2d 498, on the same points of law;

(3) The interpretation of Section 2254, Title 28 U. S. C., is not in accord with the decisions of *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, or *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572.

Appellees seek this rehearing *en banc* in order that the various decisions of this court on the same points of law may be reconciled and the conflict of this decision with the decisions of other circuit courts may be resolved.

QUESTION PRESENTED

The question presented by the decision of this court is: Must a federal district court entertain a petition for writ of habeas corpus by one confined under a final judgment of a state court where the petition shows that the petitioner has exhausted his state remedies, but where the petition on its face does not show a cause of action for federal relief? This court in this matter has answered the question affirmatively, contrary to its previous decisions and contrary to the decisions of other circuit courts.

SUMMARY OF ARGUMENT

- I. The Decisions of the Ninth Circuit Court on the Question Presented Are in Conflict
- II. The Decision in This Matter Conflicts With the Decisions of Other Circuit Courts of Appeal on the Same Question of Law
- III. The Interpretation of Section 2254, Title 28 U. S. C., Is Not in Accord With the Principles Set Forth in the Cases of *Darr v. Burford*, 339 U. S. 200, or *Ex Parte Hawk*, 321 U. S. 114

ARGUMENT

I. The Decisions of the Ninth Circuit Court on the Question Presented Are in Conflict

The decision in the instant case is in direct conflict with this court's decision in the case of *Tate v. Heinze*, 187 Fed. 2d 98 (cert. den. 409 Misc., Oct. Term, 1950). In the *Tate* case, just as in the case at bar, the district court found that the petitioner had exhausted his state remedies and further found that there was nothing alleged in the petition which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ. This court in affirming the action taken by the United States District Court used the following language:

"Unquestionably, petitioner was justly convicted, and the sentence under the state Habitual Criminal Act was justified. In view of the fact that there is no merit in the present petition the petition to file *forma pauperis* should have been denied without hesitation. We only comment that

there was no ground for a certificate of probable cause for appeal. The only reason why such a certificate is justified is the abuse of this process, which has been engendered by some appellate rulings.”

In *Bird v. Smith*, 175 Fed. 2d 260 (cert. den. 336 U. S. 954, 93 L. Ed. 1109, 69 S. Ct. 876), this court held that the district court was not entitled to consider an application for habeas corpus based on the same grounds that had been presented to the state courts and the United States Supreme Court on certiorari where no exceptional circumstances were shown.

Again, in the case of *Huffman v. Smith*, 172 Fed. 2d 129, this court reached a similar decision, on the same points of law.

It is apparent that in the instant matter, where the petitioner had full opportunity to present the points raised in the petition to the state courts on his original appeal and again on his petition for habeas corpus in which certiorari was not granted by the United States Supreme Court, he has been accorded due process of law, and in the absence of exceptional circumstances of peculiar urgency which were not found to exist by the district court there was no abuse of its discretion. Under the decision, in the case at bar, this court would deprive a district court of the use of discretion in reviewing a petition for habeas corpus and compel a full hearing on the petition where the state remedies have been exhausted, even though no substantial federal question is presented. Since the

precise procedure approved by this court in *Tate v. Heinze*, 187 Fed. 2d 98, was adopted by the district court in the instant case and this court reached a contrary conclusion, it is apparent that these cases are in irreconcilable conflict and cannot serve as a guide for future action by the district court.

II. The Decision of This Court Is in Conflict With Decisions Rendered by Other Circuit Courts of the United States

In the case of *Coggins v. O'Brien*, 188 Fed. 2d 130, decided by the United States Court of Appeals, First Circuit, the action of the United States District Court dismissing an application for habeas corpus and denying the writ was affirmed. In the cited case the petitioner had been tried and convicted in the state courts for second degree murder. He did not appeal his conviction, but made a motion for a new trial, which was denied. On appeal from the order denying the motion for a new trial, this order was affirmed by the State Supreme Court, and certiorari denied by the United States Supreme Court. Thereupon petitioner sought habeas corpus from the federal district court, which was denied, and this order affirmed on appeal. The court stated:

“While state courts have full discretionary power either to hear again or summarily to dispose of repeated applications for habeas corpus grounded on the same facts filed by prisoners in state custody, and federal courts have like powers with respect to prisoners in federal custody, different considerations apply in cases like the present. Due

respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours (see *Darr v. Burford*, 339 U. S. 200, 205, et seq., 70 S. Ct., 587, 94 L. Ed. 761, and cases cited) requires that the federal courts withhold their relief in state custody cases until it is made to appear that the state has not afforded a constitutionally adequate opportunity to prove the factual basis for a constitutional contention such as this unless 'exceptional circumstances of peculiar urgency are shown to exist.' *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. In my view the area of judicial discretion in cases like the present is limited to the evaluation of the urgency of any exceptional circumstances which may be present in a particular case."

In the case of *Goodwin v. Smyth* (4 Cir.), 181 Fed. 2d 498 (cert. den. 337 U. S. 946, 69 S. Ct. 1503, 93 L. Ed. 1748), after the petitioner had exhausted his state remedies and applied for habeas corpus on the same ground in the United States District Court, the petition was denied and this denial was affirmed on appeal. The court in basing its decision on *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, stated:

"It is clear that the petition was properly denied. There was no allegation of any such unusual circumstances as would justify a lower federal court in granting a writ of habeas corpus to release a state prisoner, when that relief had

been denied by the highest court of the state and the Supreme Court had refused certiorari. As said by that court in *White v. Ragen*, 324 U. S. 760, 764, 65 S. Ct. 978, 981, 89 L. Ed. 1348: 'If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U. S. (114), 118, 64 S. Ct. (448), 450, 88 L. Ed. 572.'

"See also *Stonebreaker v. Smyth*, 4 Cir. 163 F. 2d 498; *House v. Mayo*, 324 U. S. 42, 65 S. Ct. 517, 89 L. Ed. 739; *Darr v. Burford*, 1950, 70 S. Ct. 587, 596. In the case last cited, the Supreme Court said: 'Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds and repeated adjudications of the same issues by courts of coordinate powers.' "

In the case of *Adkins v. Smith* (4 Cir.), 188 F. 2d 452, in affirming an appeal from an order denying a writ of habeas corpus on the ground that the bill of indictment was fatally defective, the circuit court stated:

" 'We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the

Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. *While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus.* It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *White v. Ragen*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows:

“‘If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will

not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U. S. (114) 118, (64 S. Ct. 448, 88 L. Ed. 572).'

“ ‘The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words “will not usually re-examine” in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate.’ ” (Emphasis supplied.)

In the case of *Schechtman v. Foster*, 172 Fed. 2d 339 (cert. den., 339 U. S. 924, 70 S. Ct. 613, 94 L. Ed. 1346), defendant appealed from an order of the federal district court dismissing his petition for a writ of habeas corpus after conviction of robbery in the state courts of New York. His petition was based on the ground that perjured testimony was used knowingly by the prosecution. His original conviction had been affirmed without opinion by the Appellate Division of the New York courts. Leave to appeal was denied. He had also sought petitions for habeas corpus, mandamus, certiorari, and coram nobis in the state courts, certiorari to the United States Supreme Court being denied on the last coram nobis proceeding. In affirming the denial of the writ of habeas corpus by

the federal district court, the Second Circuit Court stated:

“It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judges’ conclusion that the evidence did not make out a *prima facie* case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator’s rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.”

Again, in *Weber v. Ragen* (7 Cir.), 176 Fed. 2d 579 (cert. den. 70 S. Ct. 49, 338 U. S. 809, 94 L. Ed. 489), the Seventh Circuit Court in affirming the denial of a writ of habeas corpus by the district court, stated:

“In the instant case certiorari from the Supreme Court of the United States to the Supreme Court of Illinois was sought and denied. The violations of all constitutional rights alleged here to have occurred were alleged on certiorari and urged to the Supreme Court of the United States. The Supreme Court was obviously not impressed with the petitioner’s assertion that he had been deprived by the courts of Illinois of his constitutional rights. We have been cited no case where the Supreme Court has denied certiorari, as in this case, and later decided that the United States District Court should take jurisdiction in a collateral proceeding

in habeas corpus to consider the identical questions that had been presented in the direct proceeding where certiorari was denied. * * * There are no extraordinary circumstances in this case that would take it out of the rule just stated.” (176 Fed. 2d 579, 582) To the same effect, see, *Edmondson v. Wright* (2 Cir.), 177 Fed. 2d, 719 (cert. den. 338 U. S. 944, 94 L. Ed. 582, 70 S. Ct. 425); *Goodman v. Swenson* (4 Cir.), 173 Fed. 2d 349; and *Soulia v. O'Brien* (1 Cir.), 188 Fed. 2d 233.

It thus appears that the decision of this court in the case at bar raises a direct conflict with the decisions of the other circuit courts of the United States which recognize that “exceptional circumstances of peculiar urgency” and a substantial federal question must be presented to a federal district court by a petitioner who has exhausted his state remedies before the court must entertain the petition.

III. The Interpretation of Section 2254, Title 28 U. S. Code, Is Not in Accord With the Principles Set Forth in the Cases of *Darr v. Burford*, 339 U. S. 200, or *Ex Parte Hawk*, 321 U. S. 114

In its decision this court has interpreted Section 2254, Title 28 U. S. C., which reads, in part:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

rendering such process ineffective to protect the rights of the prisoner.” (Emphasis supplied.)

so that the italicised alternatives after the word “or” have no application where, as here, there is an effective state remedy of which the applicant has availed himself. This court relies on the statement in *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, that the writ is available in the federal courts only in “rare cases” presenting “exceptional circumstances of peculiar urgency,” as not being applicable to a case in which the petitioner has exhausted his state remedies and in which he makes a substantial showing of a denial of federal right.

In both *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, and *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, the United States Supreme Court did not state that after exhaustion of state remedies by a petitioner seeking a writ in the district court that the district court must entertain the writ. In *Darr v. Burford*, 339 U. S. 200, 214-5, Mr. Justice Reed stated:

“All the authorities agree that *res judicata* does apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications and may decline to examine further into the merits because

they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers.”

It would appear that under the majority opinion in the *Darr* case, that the federal district judge has the discretion to review the petition and dismiss it where on its face no substantial federal question is presented and no extraordinary circumstances of peculiar urgency are present. (*United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138.)

In the instant matter, the petitioner has failed to bear his burden of proof in showing on the face of his petition that the state court remedies did not afford him a full and fair adjudication of his rights or that the remedies afforded by California law proved in practice unavailable or seriously inadequate (*Ex parte Hawk*, 321 U. S. 114, 118, 64 S. Ct. 448, 88 L. Ed. 572).

In *Darr v. Burford*, 339 U. S. 200, 216, it is said:

“It is this Court which ordinarily should reverse state court judgments concerning local criminal administration.” * * *

and on page 217, the court further states:

“It is this Court’s conviction that orderly federal procedure under our dual system of government demands that the state’s highest courts should ordinarily be subject to reversal only by this Court and that a state’s system for the administration

of justice should be condemned as constitutionally inadequate only by this Court.”

In interpreting this language contained in *Darr v. Burford*, supra, in *Coggins v. O'Brien*, 188 Fed. 2d 130, 134, Circuit Judge Woodbury stated:

“If the language quoted above is to be taken literally and given general application, then it would appear that even though a prior denial of certiorari to the highest state court is of no moment, it is not our function, *except in extraordinary cases*, to disagree with that court’s determination that the local system for the administration of justice squares with federal constitutional requirements. Hence, if it is not for us to disagree with the highest state court, it would seem that the function of the inferior federal courts in these cases would be only to expedite the applicant for habeas corpus along his secondary road through the federal courts to a second petition to the Supreme Court for certiorari to review the federal question which it has once declined to consider. And, on the other hand, if the denial of certiorari to the highest state court is to be given any weight at all by the inferior federal courts in cases like the present, it would seem to follow that we ought also to expedite the applicant on his way for, as pointed out by Judge Learned Hand in the *Schechtman* case, supra, 172 F. 2d 343, ‘unless we are altogether to disregard the action of the court of last resort in the very case itself, the denial ought to be conclusive.’ ” (Emphasis supplied.)

It does not appear that either the decision in the case of *Darr v. Burford*, 339 U. S. 200, nor *Ex parte*

Hawk, 321 U. S. 114, compel the conclusion that a federal district court must entertain and consider a petition for habeas corpus by one who has exhausted his state remedies absent extraordinary circumstances and a substantial federal question. In the instant case, Judge Lemmon found neither extraordinary circumstances nor a substantial question involved in his consideration of the petition presented by petitioner herein. This court in holding that Judge Lemmon abused his discretion in not further considering the petition ordered the district court “to give the application its further consideration,” but in no respect demonstrated that it considered that there was a substantial federal question involved or that in any way the petitioner had not been accorded his federal constitutional rights. The dissenting opinion of Circuit Judge Healy states:

“The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, *People v. Ekberg*, 94 Cal. App. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right.”

In the case of *Ex parte Hawk*, 321 U. S. 114, the Supreme Court found that the doctrine of requiring extraordinary circumstances to be present was inapplicable “to one in which petitioner has exhausted state remedies *and in which he makes a substantial showing of a denial of a federal right.*”

This is not the situation in the case at bar, as recognized in the dissenting opinion of Judge Healy and as pointed out in the brief of appellees filed in this matter, (Brief for Appellees, pp. 11-19), for there has been no substantial showing of a denial of a federal right.

It would thus appear that this court has attempted to restrict the doctrines established in the *Darr* and *Hawk* cases and interpreted Section 2254 in such a way as to restrict the discretion hitherto vested in the Federal District Court in a manner not warranted by either the statute or the decisions of the United States Supreme Court.

CONCLUSION

Appellees respectfully request that this court grant a rehearing *en banc* in order that this court may reconcile the opinion in the instant matter with that in *Tate v. Heinze*, 187 Fed. 2d 98, and the decisions of the other circuit courts of the United States which are in direct conflict; that the interpretation of Section 2254, Title 28 U. S. C., as adopted by this court in the case at bar eliminates the use of discretion by a federal district court in its consideration of applications for writs of habeas corpus by one confined under state process who has exhausted his state remedies, even though the face of the petition does not present a substantial federal question and therefore is not in accord with the principles enunciated

by the *United States Supreme Court* in *Darr v. Burford*, 339 U. S. 200, and *Ex parte Hawk*, 321 U. S. 114.

WHEREFORE, It is respectfully submitted that a petition for rehearing *en banc* should be granted.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the
State of California

CLARENCE A. LINN,
Assistant Attorney General
of the State of California

DORIS H. MAIER,
Deputy Attorney General of
the State of California

Attorneys for Appellees

Certification

STATE OF CALIFORNIA }
County of Sacramento } ss.

DORIS H. MAIER, being first duly sworn, deposes and says: That she is one of the attorneys for the appellees in the above-entitled matter; that in her judgment the petition for rehearing *en banc* in said matter is well founded, and that it is not interposed for the purpose of delay.

(signed)

DORIS H. MAIER

Subscribed and sworn to before me
this 26th day of September, 1951

(signed) ARTHUR A. OHNIMUS

Deputy Attorney General of the
State of California

No. 12,710

IN THE

United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, Individually, and as
District Director, Immigration and
Naturalization Service, Department
of Justice,

Appellant,

vs.

NAT YANISH and JOHN DIAZ,

Appellees.

APPELLANT'S REPLY BRIEF.

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United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

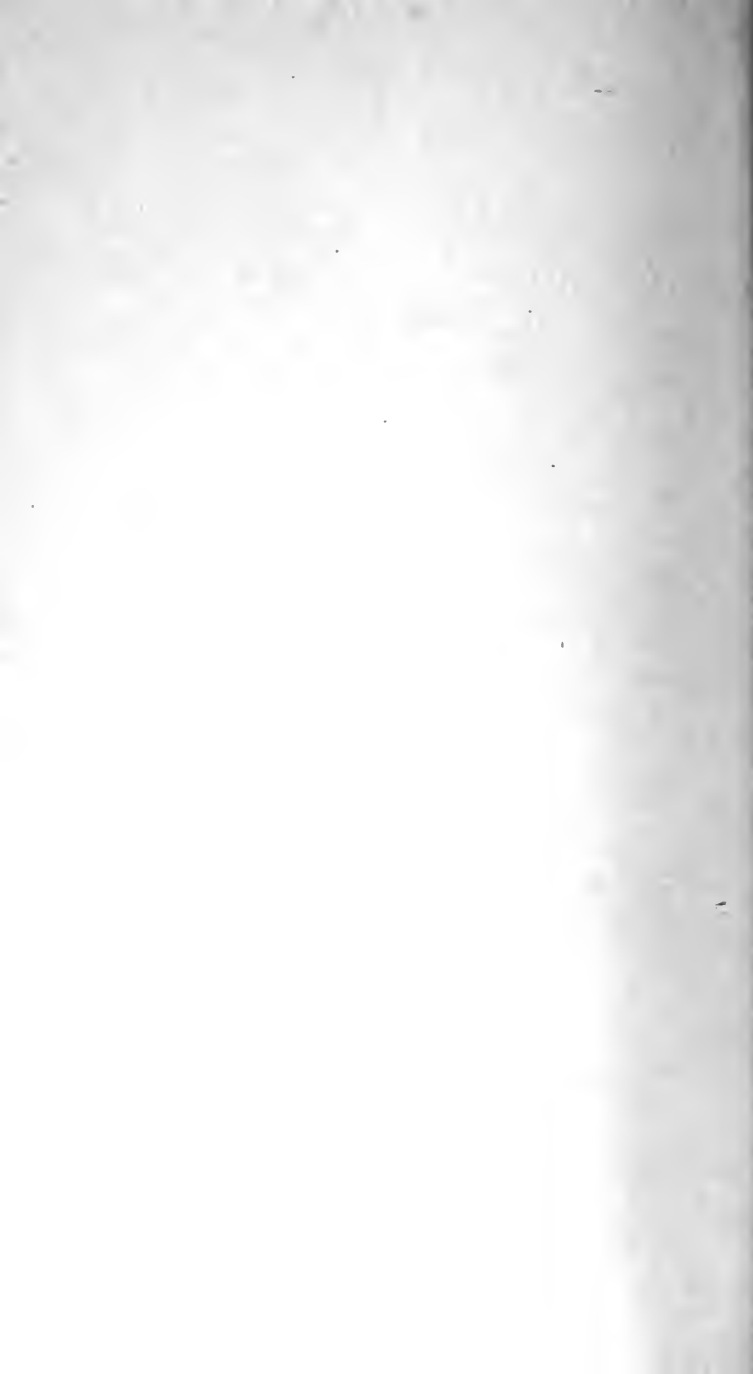
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MORTON M. LEVINE,

Immigration and Naturalization Service,

On the Brief.



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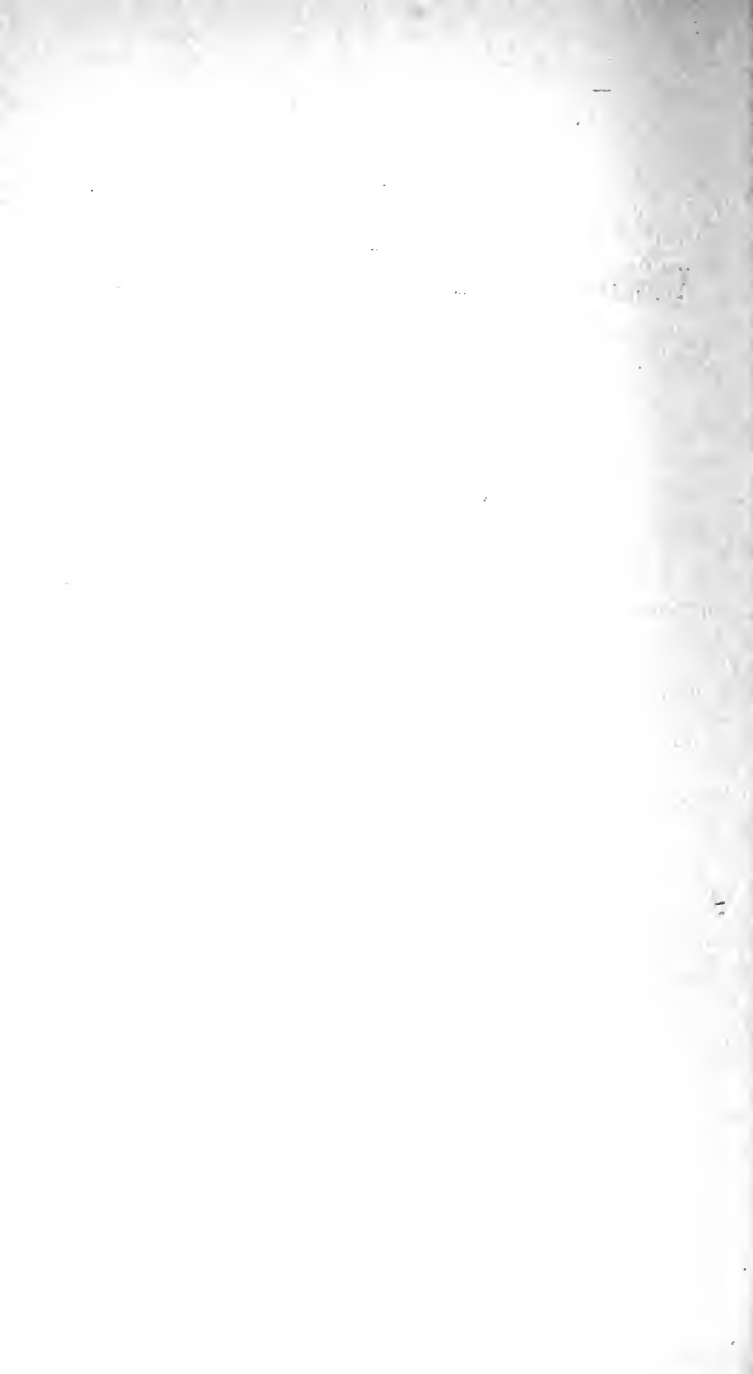
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No. 12,710

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BRUCE G. BARBER, Individually, and as
District Director, Immigration and
Naturalization Service, Department
of Justice,

Appellant,

VS.

NAT YANISH and JOHN DIAZ,

Appellees.

APPELLANT'S REPLY BRIEF.

1. THE QUESTION OF THE EFFECT OF SECTION 12 OF THE ADMINISTRATIVE PROCEDURES ACT (5 U.S.C. 1011) ON ADMINISTRATIVE PROCEEDINGS WITH REFERENCE TO APPELLEES YANISH AND DIAZ HAS NOT PREVIOUSLY BEEN LITIGATED IN THIS PROCEEDING.

The original judgment of the lower Court dismissing the complaint did not consider this point since the fact that the proceedings with respect to Yanish and Diaz had been instituted prior to the effective date of the Administrative Procedures Act did not appear on the face of the complaint.

On the first appeal, this Court had before it simply the question as to whether the lower Court erred in granting the government's motion to dismiss. The Record consisted only of the complaint and the motion to dismiss. It did not contain facts now in the record showing that as to appellees Yanish and Diaz the administrative proceeding had commenced prior to the effective date of the Administrative Procedures Act (September 11, 1946).

On the basis of the record then before it, this Court, on April 24, 1950, entered a per curiam opinion which in part states: "The judgment in this case is accordingly reversed and the cause remanded with instructions to grant the relief prayed for in the complaint, *or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate.*" (Italics supplied). Thus it may be seen that the Court below was instructed to make such disposition of the cause as would then have been appropriate, rather than specifically grant the prayed for relief. It was not a mandate from this Court, as was interpreted by the trial Court, to grant the injunction without permitting the government to file an answer should there be any material issue not presented on the face of the complaint. The order of the Court below precluded the government from establishing the fact that as to appellees Yanish and Diaz their administrative hearings had commenced prior to the effective date of the Administrative Procedures Act.

Section 12 of the Administrative Procedures Act provides in part, "and no procedural requirement

shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement''. The issues of fact as to the date of the initiating of the administrative proceedings against appellees Yanish and Diaz would then have established in the trial Court the right of the government to proceed in those two cases without regard to the Administrative Procedures Act. It has been held by the Appellate Court in the second circuit that the Administrative Procedures Act did not apply to deportation proceedings which were instituted prior to the effective date of the Administrative Procedures Act. *United States ex rel Harisiades v. Shaughnessy*, 187 F. (2d) 137.

The decision of this Honorable Court in *Anderson v. Boyd*, 188 Fed. (2d) 530, follows the aforesaid opinion.

Counsel for appellees have cited at length excerpts of the Courts' opinions in the cases of *Briggs v. Penn. R.R.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403; *United States v. Camou*, 184 U.S. 572, 22 S. Ct. 505, 46 L. Ed. 694; and *Chaffin v. Taylor*, 116 U.S. 567, 6 S. Ct. 518, 29 L. Ed. 727, to bolster the argument raised by appellees,—“whether the same question previously ruled upon by this Court may be relitigated''. However, it is well established that proceedings in the trial Court subsequent to the mandate of the Appellate Court are properly before the latter Court on a subsequent appeal. *Himely v. Rose*, 5 Cranch 312; *the Santa Maria: the Spanish Consul Libellant*, 10 Wheaton, Vol. 23 at p. 441.

The law is well settled that a lower Court may consider and decide any matters left open by the higher Court, and further, that any new matter is a proper subject for an appeal. The Supreme Court of the United States in *In re Sanford Fork and Tool Company*, 160 U.S. 247, at p. 256, stated:

“But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. * * *. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly.”

This opinion was reviewed and reaffirmed by the United States Supreme Court, *Sprague v. Ticonic National Bank, et al.*, 307 U.S. 161.

As stated above, this Court had before it on the first appeal only the complaint and motion to dismiss, and its opinion referred solely to the trial Court's order on the motion to dismiss. It is submitted that the question of the effect of Section 12 of the Administrative Procedures Act as we have shown *supra*, was not presented in the record as it then stood.

2. SUBSEQUENT STATUTORY AND REGULATORY PROVISIONS HAVE MADE HEARINGS UNDER THE ADMINISTRATIVE PROCEDURES ACT IMPOSSIBLE OF PERFORMANCE.

On July 27, 1950 the trial Court denied the government's motion for leave to file answer and entered a permanent injunction restraining appellant from initiating or conducting any proceedings seeking deportation of appellees Yanish and Diaz without compliance with the requirements of Sections 5, 7, 8 and 11 of the Administrative Procedures Act (5 U.S.C. 1004, 1006, 1007, 1010). From this decree of the District Court the government, on September 11, 1950, appealed to this Honorable Court.

Congress on September 27, 1950, enacted Public Law 843, 81st Congress, containing a provision prohibiting the conducting of deportation hearings in accordance with the hearing provisions of the Administrative Procedures Act, and on November 10, 1950 the deportation regulations were revised to conform with that statutory provision (see pp. iii, iv and v of appendix in appellant's opening brief).

The court's attention is invited to the fact that the government's appeal is from the order of the trial Court granting a permanent injunction after denying appellant's motion for leave to file answer. Consequently a change in law occurring subsequent to the trial Court's order must be applied at this time.*

A decision by this Honorable Court affirming the order of the lower Court would place appellant in the

*See cases cited on pages 21 and 22 of Appellant's Opening Brief.

position of being ordered to comply with non-existent laws and regulations and the result would be that, even should appellees be deportable, the government would be unable to effect their deportation from the United States even though their presence in the United States is considered prejudicial to the best interests of this country.

There is now no legal provision for the appointment of Hearing Examiners under the Administrative Procedures Act so far as deportation proceedings are concerned, and by the passage of Public Law 843, Congress took away the jurisdiction of any Hearing Examiner under the Administrative Procedures Act to hear and determine a deportation matter.

The appellees are in effect asking that the Immigration and Naturalization Service be required to grant to them a new deportation hearing under the now obsolete provisions of the Administrative Procedures Act. They contend that the word "hereafter" as contained in Public Law 843, 81st Cong. is prospective in scope and only refers to an action initiated in the future. Their view is obviously erroneous. The mere reading of the statute will clearly establish that the intent of Congress was to remove the burden from the Immigration and Naturalization Service of conducting this type of hearing. With the present litigation still undetermined the government was unable to afford the appellees a hearing under the Administrative Procedures Act during the time the aforesaid Act was in force. If this Honorable Court requires a new and complete hearing, such hearing would of ne-

cessity take place "hereafter" the enactment of the above referred to Public Law 843 of the 81st Congress, and would be contra to the expressed intent of that Congress.

We submit that the trial Court was in error in refusing to permit the government to show that as to the appellees the deportation proceedings were commenced prior to the effective date of the Administrative Procedures Act, hence were expressly excepted from the proceedings set up by that Act.

We submit further that the Congress by enacting Public Law 843 subsequent to the entering of the judgment by the trial Court took away the jurisdiction of any hearing examiners under the Administrative Procedures Act to hear any deportation case thereafter.

Dated, San Francisco, California,

August 10, 1951.

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No. 12711

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED TATE,

Appellant,

v.

THE PEOPLE OF THE STATE OF CAL-
IFORNIA, and ROBERT A. HEINZE,
Warden of Folsom Prison,

Appellees.

BRIEF FOR APPELLEES

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IFORNIA and ROBERT A. HEINZE,
Warden of Folsom Prison,

Appellees.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The appellant herein sought to file a petition for the issuance of a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (Tr. 18.) The Honorable Dal M. Lemmon, judge of said court, on June 26, 1950, denied to petitioner the right to file the petition *in forma pauperis* on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ. (Tr. 20.) On July 25, 1950, a "Notice and Application for a Rea Hearing" [sic]

was filed in said matter (Tr. 21-26) which was denied by said court on July 24, 1950 (Tr. 34). On August 18, 1950, appellant filed a document entitled "Notice and Application, and Motion on Petition for and Appeal on Pauperis" with said District Court (Tr. 37-42) and on August 18, 1950, Hon. Dal M. Lemmon, United States District Judge, signed a certificate of probable cause and ordered that an appeal might be taken in said matter. (Tr. 44-45.)

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

In the case of *Dorsey v. Gill*, 148 F. 2d 857 (cert. denied 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The opinion, which is exhaustively annotated, summarizes the procedure which may be followed by a district court on a petition for the issuance of a writ of habeas corpus and states (pp. 865-866):

"There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or

he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of

convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once.”

The procedure suggested under No. (1) *supra*, was precisely the procedure followed by the Honorable Judge Dal M. Lemmon in the instant matter.

In commenting upon the abuse of the writ of habeas corpus and the necessity of the court to which a petition is addressed determining preliminarily whether justice is to be served by the issuance of the writ, the court in *Dorsey v. Gill*, 148 F. 2d 857, further stated (pp. 862-3):

“Today, in the District of Columbia, we find a similar contrast. Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriage of justice, but also as a device for harrassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5 * * *. The number has increased most rapidly during the last three years, since the Supreme Court’s decision in *Walker v. Johnston*, and since one of the opinions filed in this Court in the *Rosier* case, admonished the District Court that: ‘Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price

to pay for the previous right of access to the courts guaranteed under our system of government *to all who claim to be wronged*' (Italics supplied.) Thus, if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held."

A similar situation would have prevailed in the case at bar for in appellant's "Notice and Application and Motion on Petition for and Appeal on Pauperis" are listed the previous actions taken by him (Tr. 38), judicial notice of which may be taken by this court (*Knight v. People*, 60 F. Supp. 164). These are properly reflected by the records of the state and federal courts as follows:

- 1/ 4/46 Judgment of conviction on original charge affirmed and reported in *People v. Tate*, 72 Cal. App. 2d 467, 164 P. 2d 556.
- 1/14/46 Petition for Rehearing in Fourth District Court of Appeal denied (*People v. Tate*, 72 Cal. App. 2d 472, 164 P. 2d 556).
- 4/ 3/47 Order denying petition for writ of error coram nobis affirmed by Fourth District Court of Appeal, State of California reported in *People v. Tate*, 78 Cal. App. 2d 894, 178 P. 2d 470.
- 4/14/47 Petition for Rehearing denied by Fourth District Court of Appeal (*People v. Tate*, 78 Cal. App. 2d 896, 178 P. 2d 470).

- 5/ 1/47 Petition for Hearing in California Supreme Court denied (*People v. Tate*, 78 Cal. App. 2d 896, 178 P. 2d 470).
- 11/14/47 Petition for writ of habeas corpus filed with the Third District Court of Appeal of the State of California, 3 Crim. 2049, denied without opinion.
- 12/11/47 Petition for Hearing in 3 Crim. 2049 in the California Supreme Court denied without opinion.
- 6/14/48 Petition for writ of certiorari from 3 Crim. 2049 denied without opinion (Misc. 507, Oct. Term 1947), 334 U. S. 842.
- 10/11/48 Petition for Rehearing in United States Supreme Court denied in Misc. 507 (Oct. Term 1947), 335 U. S. 839.
- 12/13/48 Petition for writ of habeas corpus filed in United States District Court Northern Dist. Calif. Northern Division denied (No. 6068).
- 2/ 1/49 Request for allowance of appeal in No. 6068 denied by Ninth Circuit Court of Appeals.
- 2/23/49 Petition for Rehearing denied—Ninth Circuit Court.
- 6/23/49 Petition for writ of habeas corpus denied by Sacramento Superior Court No. 17323.
- 10/25/49 Petition for writ of habeas corpus filed with the Third District Court of Appeal of the State of California, 3 Crim. 2180, denied without opinion.

- 11/21/49 Petition for Hearing by the California Supreme Court in 3 Crim. 2180, denied without opinion.
- 2/13/50 Petition for writ of certiorari to review 3 Crim. 2180 denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 337 U. S. 903, 94 L. Ed. 382.
- 3/27/50 Petition for Rehearing denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 94 L. Ed. 509.
- 5/ 1/50 Petition for Rehearing denied by the United States Supreme Court (301 Misc., Oct. 1949 Term), 94 L. Ed. 723.

The petition on its face in the instant matter presents no grounds which have not been presented hitherto in the various actions filed by appellant and no grounds which were not within his knowledge at the time of the original appeal in the state courts (*Salinger v. Loisel*, 265 U. S. 224, 230; *Darr v. Burford*, 339 U. S. 200). It is apparent that it does not comply with the provisions of Section 2244, Title 28, United States Code.

Moreover under the provisions of Section 2254, Title 28, United States Code, which reads as follows:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

rendering such process ineffective to protect the rights of the prisoner.

“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”

the appellant herein has not exhausted the remedies available in the state courts. Appellant still has the right to raise all the points here attempted to be presented in the courts of California by means of a petition for writ of habeas corpus which is an available state corrective process. (*Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 176-7; *Smyth v. Stonebreaker* (4 Cir.), 163 F. 2d 498, 501.)

There is no showing made on the face of the petition that there were any circumstances rendering such process which is available in the courts of California ineffective to protect the rights of the prisoner.

Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587.

It should be noted that the appellant did not attempt to seek a petition for hearing in the Supreme Court of the State of California from the affirmance of his original conviction by the Fourth District Court of Appeal in the case of *People v. Tate*, 72 Cal. App. 2d 467, nor did he petition the United States Supreme Court for certiorari in said matter (*Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587; *Ex Parte Hawk*, 321 U. S. 114, 64 S. Ct. 448) and each of the points raised in the instant petition could have been brought

to the courts' attention on the original appeal from the judgment of conviction.

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

Although appellant herein was represented by counsel at the trial of his original action and on the hearing on the writ of error *coram nobis* in the state courts he appeared in *propria persona* on the appeals and is appearing in *propria persona* in the present matter. The points raised in his opening brief on this appeal have hitherto been considered by both the state and federal courts and have been held to be without merit.

Appellant contends that the judgment and commitment under which he is being confined in Folsom State Prison, State of California, is void apparently on the following grounds:

- (1) That there was no trial as "your petitioner has never faced a complaining witness" (Tr. 2);
- (2) There was no proof of his prior convictions adduced in evidence at his trial (Tr. 2, 5-6);
- (3) That the testimony was perjured (A. O. B. 2-6);
- (4) That his guilt was not established beyond a reasonable doubt (A. O. B. 11);
- (5) That Section 644 of the Penal Code of the State of California is a violation of the Federal Constitution (Tr. 13).

These points have been fully considered by the opinions of the District Court of Appeal of the State

of California in and for the Fourth Appellate District in the cases of *People v. Tate*, 72 Cal. App. 2d 467, 164 P. 2d 556, and *People v. Tate*, 78 Cal. App. 2d 894, 178 P. 2d 470.

From the case of *People v. Tate*, 72 Cal. App. 2d 467, 164 P. 2d 556, it appears that the defendant and appellant herein was charged in Count I of an information with the crime of grand theft, in that on May 7, 1945, he did "wilfully, unlawfully and feloniously take and steal from the person of one Robert Nealey certain personal property, to wit, lawful money of the United States of America" in violation of Sections 484 and 487 of the Penal Code of the State of California. In Counts II, III and IV he was charged with prior convictions of felonies and the serving of prison terms thereunder. Defendant pleaded not guilty to Count I and admitted the prior convictions as charged. After a jury trial at which the defendant was represented by counsel, the defendant and appellant herein was found guilty as charged; the court adjudged him to be an habitual criminal and he was sentenced to the state prison for the term prescribed by law. On appeal the entire record was reviewed by the appellate court and with relation to the points raised by appellant herein, the court stated in part:

"Most of the claimed errors will be considered under the question whether the evidence is sufficient to support the verdict. As we view the defendant's argument, it is his contention that the testimony of Neeley was not sufficient to establish the corpus delicti. It is argued that Neeley

did not know that defendant took the money from his pocket. There is direct evidence of two other witnesses to the effect that they saw the defendant take the money from Neeley's pocket. This was sufficient proof of that fact without the testimony of Neeley.

It is next argued that the testimony of the witnesses for the defense established, as a matter of law, a reasonable doubt as to his guilt. A mere statement of the testimony of the witnesses shows only a conflict in the evidence. There was substantial evidence, if believed by the jurors, and of which they are the judges, to justify the finding of guilty as to the first count. (*People v. Hennessey*, 201 Cal. 568 (258 P. 49).) We see no merit to this argument.

The last contention is that defendant was improperly adjudged an habitual criminal. The second count of the information charged that he had been previously convicted of a felony, to wit, violation of the Drug Act in the State of Utah, and that he served a term of imprisonment in the United States prison at Leavenworth, Kansas.

The third count charges that in Oregon, he was convicted of a felony, to wit, the crime of assault with intent to kill, and served a term of imprisonment in the Oregon State Prison.

In the fourth count it is charged that he was previously convicted in the State of Utah with a felony, to wit, the crime of burglary (second degree), and that he served a term of imprisonment therefor in the Utah State Prison. On arraignment, when he was represented by counsel, defendant fully admitted the three prior convictions as

charged and thereafter went to trial upon the plea of not guilty as to the charge set forth in the first count. On June 22, 1945, at the time of the arraignment for judgment, the court adjudged the defendant to be an habitual criminal, as provided by Penal Code section 644, subdivision (a). The date of the commission of the offense and the date of sentence were both prior to the effective date of the amendment to that section which was enacted on June 16, 1945, and went into effect on the 91st day thereafter. (Stats. 1945, chap. 934.) Under that section, as it then existed, 'Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of robbery, burglary * * * assault with intent to commit murder, * * * felonious assault with a deadly weapon, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life.' The constitutionality of this section has been determined on many occasions * * * (citations) * * *.

The prior conviction of violation of the Drug Act is not a felony enumerated in section 644, subdivision (a), *supra*, and is not, therefore, a prior conviction which will serve as a basis for an adjudication of habitual criminality. However, assault with intent to kill and burglary are both crimes enumerated in that section and the prior conviction of such, with the service of prison terms therefor, does serve as such a basis. The defendant

was properly found to be twice previously convicted of, and served prison terms for, crimes enumerated therein and he was properly adjudged to be an habitual criminal thereunder.

We assume, from defendant's brief, that it is his contention that the full faith and credit clause of article IV of the federal Constitution was violated because of the failure of the prosecution to introduce properly authenticated documents to support the finding that defendant suffered the prior convictions above mentioned. We are unable to see that any question of violation of such constitutional provision arises here, first, because nowhere in the record does it show that any documents or records whatever were introduced; secondly, defendant admitted the charges of those prior crimes and the service of sentences thereunder, therefore, it was not necessary that any further evidence be taken in reference thereto. (*People v. Stone*, 69 Cal. App. 2d 533, 535, (159 P. 2d 701).)

We have studied the record of this case carefully and have been unable to find any errors therein. Defendant had a fair and impartial trial. The evidence of his guilt was overwhelming."

This opinion was reaffirmed by the court's decision in the case of *People v. Tate*, 78 Cal. App. 2d 894, 178 P. 2d 470, which involved an appeal from the denial of a petition for writ of error *coram nobis* filed in the Superior Court of the State of California in and for the County of Imperial. At this hearing, the appellant herein was represented by counsel and appealed from

the order denying the petition. In its opinion upholding the ruling of the trial court, the Fourth District Court of Appeal stated (78 Cal. App. 2d 894, 895-6):

“The appellant argues that he was denied his statutory and constitutional rights; that the original information was not sufficient; that ‘there was not a *corpus delicti* proven’; that it was not proved that there had been a crime committed; that the court made erroneous rulings on the admission of evidence; and that the fact that he was an habitual criminal was not established. All of these matters could have been raised on the appeal from the judgment and practically all, if not all, were so raised. It is well settled that under such circumstances a second review cannot be secured through the writ here relied upon. (*People v. Mooney*, 178 Cal. 525 (174 P. 325); *People v. Egan*, 73 Cal. App. 2d 894 (167 P. 2d 766).) In principle, every point here raised was covered, adversely to the appellant, in the opinion in the case last cited.

The appellant further contends that the judgment was based upon perjured testimony, and that his counsel at the time of trial failed to bring out the fact that the testimony was perjured. There is nothing in the record to sustain this contention. At the hearing on this petition in the trial court, while there was considerable argument and the appellant made several statements as to his contentions, no evidence was produced or offered. While in his statements the appellant complained that the transcript of the evidence taken at the preliminary examination was not produced and introduced at the trial, and that the variance between certain

testimony as given at the preliminary hearing and as given at the trial constituted perjury, it was not pointed out just what testimony was claimed to be perjured and no evidence was introduced for the purpose of establishing such a fact.

In his briefs on this appeal, the appellant refers to and relies on certain testimony which purports to be a quotation from the record at the preliminary hearing and other testimony from the record at the time of the trial. Assuming that this record was properly before us, the matters referred to either constitute slight variances in testimony concerning immaterial matters, or relate to things concerning which there was an abundance of other evidence. Nothing now presented by the appellant would justify any interference with the judgment of conviction. (*People v. Kirk*, 76 Cal. App. 2d 496 (173 P. 2d 367).)

Nothing appears to indicate that the appellant did not have a fair and impartial trial and, as this court said in deciding the appeal from the judgment, 'the evidence of his guilt was overwhelming'."

It has long been a settled rule that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ.

Burall v. Johnson, 134 Fed. 614, Cert. Den., 63 S. Ct. 1327, Rehearing Den., 64 S. Ct., 319 U. S. 768, 30, 320 U. S. 810, Rehearing Den., 64 S. Ct. 187, 320 U. S. 812;

Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588.

The petition for writ of habeas corpus in the instant matter sets forth no facts showing that perjured testimony was knowingly used by the prosecution and the state court in *People v. Tate*, 78 Cal. App. 2d 894, recognized that although appellant was afforded an opportunity to produce such evidence he failed to adduce any evidence in support of this allegation. Therefore, this point is without merit.

Hinley v. Burford (10 Cir.), 183 F. 2d 581;
Casebeer v. Hudspeth (10 Cir.), 121 F. 2d 914;
Story v. Burford (10 Cir.), 178 F. 2d 911;
Cobb v. Hunter (10 Cir.), 167 F. 2d 888.

With relation to appellant's contentions that there was no proof of his prior convictions adduced at his trial, it is apparent that where a defendant pleads guilty to a count of an information charging certain prior convictions and the service of sentence therefore in a state or federal prison it is unnecessary for evidence to be adduced in support of such prior convictions.

People v. Stone, 69 Cal. App. 2d 533, 159 P. 2d 701;
24 C. J. S. Sec. 1964, pp. 1157-8.

Section 644 of the Penal Code of the State of California has been held to be constitutional both under the state and federal constitutions many times as well as have other state and federal statutes providing for increased punishment for subsequent offenses.

People v. Stone, 69 Cal. App. 2d 533, 159 P. 2d 701;
In re Schunke, 81 Cal. App. 2d 588, 184 P. 2d 700;

People v. Richardson, 74 Cal. App. 2d 542, 169 P. 2d 47;

People v. Israel, 91 Cal. App. 2d 775, 206 P. 2d 69;

People v. Biggs, 9 Cal. 2d 508, 71 P. 2d 214, 116 ALR 205;

People v. Dutton, 9 Cal. 2d 505, 71 P. 2d 218, App. dismissed;

Dutton v. People, 302 U. S. 656;

In re Rosencrantz, 205 Cal. 534, 271 P. 902;

People v. d'A Phillip, 220 Cal. 620, 32 P. 2d 962.

In *Darr v. Burford*, 339 U. S. 200, 218, 70 S. Ct. 587, 597, the United States Supreme Court stated:

“A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a federal court’s intervention to protect the rights of the accused. The petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist.”

This it is apparent appellant has not done in the case at bar.

CONCLUSION

It is submitted that the district court properly exercised its discretion in concluding that this was not one of those “rare cases where exceptional circumstances of peculiar urgency are shown to exist”

and the meager allegations contained in the petition unsupported by facts bring this matter within the language of *Boyd v. O'Grady*, 121 F. 146, 147, and cases therein cited:

“the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist.”

It is therefore respectfully submitted that the order of the district court denying appellant the right to file the petition for writ of habeas corpus in the present matter should be affirmed.

Dated: Sacramento, California, December 8, 1950.

FRED N. HOWSER

Attorney General of the State of
California

DORIS H. MAIER

Deputy Attorney General of the
State of California

Attorneys for Appellees

No. 12712

United States
Court of Appeals
for the Ninth Circuit.

L. I. MACKLIN, et al.,

Appellants.

vs.

KAISER COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon

FILED

JAN 11 1951

PAUL P. O'BRIEN
CLERK



No. 12712

**United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland Oregon,

For Appellee.

In the District Court of the United States
For the District of Oregon

No. Civil 3000

L. I. MACKLIN, LEN A. MAPLE, GEORGE W.
HESS, R. F. YEO, ERICK E. SUNDBERG,
J. H. STONEMAN, W. G. IMUS, C. E. CUL-
VER, A. F. WARRICK, JOHN J. HILL, J. J.
KNOX, E. R. JOHNSON, M. F. WILLIAMS,
H. J. WEIGEL, H. O. HANSON, ARTHUR
B. TODD, JOHN T. HOLDEN, S. M. ROG-
ERS, DANIEL J. CHASE, JOHN POPMA,
GEORGE F. NICKELS, R. J. PENNIWELL,
T. W. CRAIG, HERBERT J. CARLYLE,
JAMES O. BRYANT, G. G. DEAN, CLIN-
TON A. WARRINER, J. E. CRONIN, H. E.
CARR, G. O. TRUE, O. L. RAWLS, W. J.
PEDDICORD, O. P. BJORNSGAARD, AR-
THUR E. GLENNON,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action
allege:

I.

Plaintiffs bring this action under and pursuant to
the Fair Labor Standards Act of 1938 (29 U.S.C.A.
201). Jurisdiction is conferred on the Court by

Section 16 (b) of said Act and by Sections 24 (1) and (8) of the Judicial Code (28 U.S.C.A. 41).

II.

At all times mentioned herein defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Nevada and engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of said Act, in that defendant was and is engaged in the operation of a shipyard at Portland, Oregon, known as the Swan Island Yard at which defendant was engaged in the construction of ships, all of which have been produced from materials substantially all of which were shipped to defendant's said yard from points outside said State of Oregon and substantially all of said ships have been produced for interstate commerce and have been sold and delivered and offered for sale and delivery in interstate commerce by defendant from defendant's said shipyard at Portland, Oregon, to various points outside the State of Oregon, and, in addition, by reason of the fact that at said yard defendant was and is engaged in the repair of ships substantially all of which are regularly engaged in interstate commerce and have come to said yard for repairs from points outside said State of Oregon and are enroute after said repairs to points outside said State of Oregon, said ships being repaired by the use of materials substantially all of which were shipped to defendant's said yard from points outside the State of Oregon.

III.

At all times herein mentioned, and particularly between July 1, 1942, and March 1, 1945, said defendant maintained at said Swan Island Yard a Guard Department which said department was at all times mentioned herein, and now is, an integral, and indispensable part of said operations and of the construction of ships for interstate commerce and the repair of ships engaged in interstate commerce, as aforesaid, in that, among other things, said department protected said yard from fire, sabotage and lawlessness that might otherwise have prevented, interfered with, or impeded said production and repairs.

IV.

At all times hereinafter mentioned plaintiffs were employed by defendant in said department as guards; that all of plaintiffs had duties which included, among other things, the protection of said yard from fire, sabotage, and lawlessness, as aforesaid, and that the performance of said duties by plaintiffs was an occupation necessary to the production of said ships for interstate commerce, as aforesaid, and was also an integral and indispensable part of the repair of ships engaged in interstate commerce as aforesaid.

V.

Plaintiff L. I. Macklin is informed and believes and therefore alleges as follows, reserving the right to amend upon gaining more specific information:

A. That between September 22, 1942, and Octo-

ber 7, 1943, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of 95c and was paid at said rate, with time and one half for certain of the overtime hours worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid, said plaintiff was employed and compelled by defendant to work thirty (30) minutes per day as a result of the fact that plaintiff was required to report for roll call, inspection, and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of 95c per hour for 30 minutes each day worked, making a total of \$.711 $\frac{1}{4}$ c per day for 314 days worked during said period or a total of \$223.73 which said plaintiff was not paid during said period;

B. That during the period between October 7, 1943, and January 1, 1944, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of \$1.03 and was paid at said rate, with time and one half for certain of the overtime hours worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which plaintiff was paid as aforesaid plaintiff was employed and compelled by defendant to work 30 minutes per day as a result of the fact that said

plaintiff was required to report for roll call, inspection and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of \$1.03 per hour for 30 minutes each day worked, making a total of \$.77½c per day for 84 days worked during said period or a total of \$65.10 which said plaintiff was not paid during said period;

C. That during the period between December 17, 1944, and March 1, 1945, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of \$1.20 and was paid at said rate, with time and one half for certain of the overtime worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid plaintiff was employed and compelled by defendant to work 30 minutes per day as a result of the fact that plaintiff was required to report for roll call, inspection and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of \$1.20 per hour for 30 minutes each day worked, making a

total of \$.90c per day for 14 days worked during said period or a total of \$12.60 which said plaintiff was not paid during said period;

D. That said plaintiff has demanded that defendant pay said additional wages for said hours in accordance with the terms of Section 7 (a) (3) of said Act, but defendant, in violation of said Act, as aforesaid, has wholly failed, neglected and refused to pay any such additional wages; that by reason whereof said plaintiff is entitled to have and receive of defendant as wages and overtime compensation for the periods specified above, in accordance with said provisions of said Act, the total sum of \$301.43.

E. In addition to said unpaid wages of \$301.43, as hereinabove set forth, said plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of Section 16 (b) of said Act an additional amount equal to one and a half times the said plaintiff's regular rate of pay for all of said unpaid hours worked during the periods specified above; that is to say, said plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of said provisions of said Act, an additional sum of \$301.43.

F. Said plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages and said plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys fees by virtue of the provisions of Section 16 (b) of said Act; that a reasonable amount to be allowed plaintiff as attorneys fees herein is the sum of \$90.00.

[“Paragraphs VI to XXXVII have been omitted in printing and consist of allegations similar to those of paragraph V for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys’ Fees Claimed
6. Len A. Maple.....	\$559.54	\$559.54	\$170.00
7. George W. Hess.....	207.42	207.42	60.00
8. R. F. Yeo.....	613.28	613.28	180.00
9. Eric E. Sundberg.....	315.31	315.31	90.00
10. J. H. Stone.....	510.97	510.97	150.00
11. W. G. Imus.....	632.21	632.21	190.00
12. C. E. Culver.....	331.88	331.88	100.00
13. A. F. Warrick.....	186.98	186.98	60.00
14. Arthur E. Glennon.....	460.30	460.30	140.00
15. J. J. Knox.....	560.44	560.44	170.00
16. E. R. Johnson.....	397.87	397.87	120.00
17. M. F. Williams.....	579.38	579.38	160.00
18. H. J. Weigel.....	341.44	341.44	100.00
18(2) H. O. Hanson.....	506.41	506.41	150.00
19. Arthur B. Todd.....	191.93	191.93	60.00
20. John T. Holden.....	123.98	123.98	40.00
21. S. M. Rogers.....	224.63	224.63	50.00
22. Daniel J. Chase.....	512.92	512.92	150.00
23. John Popma	597.80	597.80	180.00
24. George F. Nickels.....	125.40	125.40	40.00
25. T. W. Craig.....	514.02	514.02	150.00
26. Herbert J. Carlyle.....	64.13	64.13	20.00
27. James O. Bryant	94.05	94.05	30.00
28. G. G. Dean.....	85.50	85.50	30.00
29. Clinton A. Warriner.....	128.25	128.25	40.00
30. John L. Hill.....	570.00	570.00	170.00
31. R. J. Penniwell.....	463.41	463.41	140.00
32. J. C. Cronin.....	300.00	300.00	90.00
33. H. E. Carr.....	300.00	300.00	90.00
34. G. O. True.....	300.00	300.00	90.00
35. O. I. Rawls	300.00	300.00	90.00
36. W. F. Peddicord.....	300.00	300.00	90.00
37. O. P. Bjornsgaard.....	300.00	300.00	90.00”]

Wherefore, plaintiffs pray for judgment in the sum of \$12,000.88; for the further sum of \$12,000.88 as liquidated damages; for the further sum of

\$3,570.00 as attorneys fees; and for plaintiffs' costs and disbursements herein.

MOWRY & MOWRY,

/s/ EDWIN D. HICKS,

/s/ THOMAS H. TONGUE, III.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Leave having been granted to plaintiffs to file the foregoing supplemental complaint and to add as parties-plaintiff herein the following: Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, I. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theodore F. Maynard, Marion M. Long, W. C. Griffin, James W. Fader and Charles J. Wilson, now therefore, plaintiffs allege:

I.

Since the filing on December 7, 1945, of the complaint herein the foregoing Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, I. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theodore F. Maynard, Marion M. Long, W. C. Griffin, James W. Fader and Charles J. Wilson have engaged the undersigned attorneys for the original plaintiffs herein and have authorized said attorneys

to add their names as parties-plaintiff in the above-entitled cause and to seek therein to recover back wages due under the Fair Labor Standards Act of 1938 (29 U.S.C.A. 201), together with liquidated damages and attorneys fees as provided under said Act.

II.

That both the original plaintiffs herein and the parties-plaintiff added herein and whose names are listed in Paragraph I hereof are employees or former employees of defendant and are or were employed by defendant as guards at defendants Swan Island Yard at Portland, Oregon, under the circumstances as set forth in paragraphs II, III and IV of the original complaint as filed herein and all of said plaintiffs assert rights to relief in respect of and arising out of the same series of transactions and occurrences, and questions of law and fact common to all of said plaintiffs and to the respective rights and claims thereof will arise in said action.

III.

That plaintiff Orval L. Lancaster, adopts by reference all of the allegations of Paragraph V of the original complaint filed herein, which by this reference are made a part hereof, except that said plaintiff has no present recollection independent from defendant's payroll records, as to the exact periods of time, rates of pay and amounts due for each day and week worked, as well as the totals due for said periods of time, but estimates that said plaintiff was employed from April 14, 1943, to July

1944, and that there is now due and owing from defendant to plaintiff a sum in excess of \$350.00, with an additional equal amount as liquidated damages and that a reasonable attorneys fee is a sum of at least \$105.00 and reserves the right to amend this paragraph upon obtaining more specific information as to the matters alleged herein.

[Paragraphs IV to XX have been omitted in printing and consist of allegations similar to those of paragraph III for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
4. W. J. Cox.....	\$400.00	\$400.00	\$120.00
5. Claude F. Krigbaum.....	250.00	250.00	75.00
6. I. W. Collier.....	100.00	100.00	30.00
7. John H. Van Hook.....	450.00	450.00	135.00
8. Arthur E. Johnson.....	350.00	350.00	105.00
9. R. I. Nordeide.....	650.00	650.00	195.00
10. Lee Mainard	100.00	100.00	30.00
11. B. L. Cash.....	650.00	650.00	195.00
12. Perry Hunt	150.00	150.00	45.00
13. Charles J. Monrean.....	300.00	300.00	90.00
14. W. T. Taulbee.....	300.00	300.00	90.00
15. George E. Dopp.....	300.00	300.00	90.00
16. Theodore F. Maynard....	300.00	300.00	90.00
17. Marion L. Long.....	300.00	300.00	90.00
18. W. C. Griffin.....	200.00	200.00	80.00
19. James F. Fader.....	50.00	50.00	15.00
20. Charles J. Wilson.....	300.00	300.00	90.00"]

Wherefore, plaintiffs pray in addition to the sums for which judgment was prayed for in the original complaint filed herein, that judgment be entered in the sum of \$5500.00; for the further sum of \$5500.00 as liquidated damages; for the further of \$1650.00

as attorneys fees; and for plaintiffs' costs and disbursements herein.

MOWRY & MOWRY,

/s/ EDWIN D. HICKS,

/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

Service acknowledged.

[Endorsed]: Filed Jan. 30, 1946.

[Title of District Court and Cause.]

ANSWER

Now comes defendant and for answer and defense to plaintiffs' complaint and supplemental complaint, admits, denies and alleges as follows:

I.

Defendant admits that during all the dates and times mentioned in said complaint and supplemental complaint it was and is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and that defendant was during a part of the said dates and times engaged in the operation of a shipyard at Portland, Oregon, known as the Swan Island Shipyard, at which shipyard defendant, during a part of said dates and time, was engaged in the construction and repair of ships.

II.

Except as hereinabove expressly admitted, stated or qualified, defendant denies generally each and every allegation, matter and thing in plaintiffs' complaint contained and the whole thereof.

Wherefore, defendant having fully answered [3*] plaintiffs' complaint and supplemental complaint, demands judgment that plaintiffs take nothing by reason thereof, and that plaintiffs' action be dismissed.

FLETCHER ROCKWOOD,
/s/ FLETCHER ROCKWOOD,
Attorney for Defendant.

Service accepted.

[Endorsed]: Filed Feb. 18, 1946.

[Title of District Court and Cause.]

ORDER OF DISMISSAL AS TO JAMES W.
FADER AND CLINTON A. WARRINER

Based upon the motion of the plaintiffs and upon stipulation of the parties hereto, by and through their attorneys of record, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the above entitled cause be and the same is hereby dismissed without prejudice and without costs to either party insofar as said cause relates in any way to the claim of James W. Fader, and to the claim of Clinton A. Warriner.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Dated this 19th day of April, 1946.

/s/ JAMES ALGER FEE,

United States District Judge.

[Endorsed]: Filed April 19, 1946. [4]

[Title of District Court and Cause.]

STIPULATION RE TESTIMONY OF GEORGE
MOWRY, ET AL

It is hereby stipulated by and between the parties hereto, through their respective attorneys, that Messrs. George Mowry, John Mowry, Edwin D. Hicks and Thomas H. Tongue III, if called by the plaintiffs as witnesses in this action, being duly sworn, would testify as follows:

1. That the above entitled action involves the claims of 52 employees and former employees of defendant for alleged unpaid overtime compensation under the Fair Labor Standards Act of 1938, in the amount of \$17,500 and an equal amount as liquidated damages, making a total claim in the amount of \$35,000.00.

2. That in connection with the said action it was necessary that plaintiffs' attorneys hold one or more conferences with nearly all of these 52 employees to ascertain the material facts concerning their claims, including the entire periods of their employment, often in excess of three years, their rates of pay, with any changes, for each week throughout such

periods, their duties during such periods and the relationship of such duties to commerce and the production of goods for commerce, the amount of time each day and each week for which they claimed wages were unpaid, and their duties during such times, in order to determine whether such time was properly "time worked" under the Act.

3. That plaintiffs' attorneys held innumerable and at times almost daily conferences, either personally or by telephone, with employees or committees of employees who called on plaintiff's attorneys through the period of over seven months required to consummate a settlement of the action and, in particular, during the period of approximately two months since the parties reached substantial agreement as to the terms of settlement, at which conferences it was necessary to explain the reasons for delay in the conclusion of the settlement because of the necessity of first securing approval by the United States Attorney, the United States Maritime Commission and the United States District Court.

4. That it was necessary to conduct legal research in order to sustain plaintiffs' position on the following legal issues involved in the action:

a. Whether plaintiffs were at all times engaged in commerce or the production of goods for commerce within the meaning of the Act.

b. Whether the time for which plaintiffs claimed payment was "time worked" within the meaning of the Act.

5. That it was necessary to prepare the evidence

to sustain plaintiffs' position on the following issues of fact involved in the action:

- a. The amount of time per day and per week for which plaintiffs were not paid.
- b. Whether such time was overtime work in excess of 40 hours per week.

6. That it was necessary to prepare computation of the amounts allegedly due to each of the 52 employees during the entire period of their employment, independent from company computations submitted later during the course of negotiations.

7. That it was necessary to prepare a complaint and supplemental complaint alleging the necessary facts to set forth a cause of action under the Act, including the necessary facts as to jurisdiction and coverage, and which also, due to preference of the employees themselves, set forth the claim of each of the 52 employees individually, resulting in pleadings 37 pages in length.

8. That it was necessary to make appearances in Court on six occasions for the purpose of answering call dates, presenting a motion to file a supplemental complaint, and to present the proposed settlement for Court approval.

9. That the settlement of the case necessitated a prolonged course of negotiations with the defendant and its attorneys for the purpose of arriving at a settlement of the action, beginning with conferences early in October, 1945, with the company's resident attorney at the Swan Island Yard and continuing

through over eight lengthy conferences during January, February and March with defendant's attorneys.

10. That the settlement of the case also necessitated over 20 incidental conferences, including conferences with defendants' attorneys for extensions of time to answer, conferences with associate counsel to discuss proposals for settlement made by and to defendant, and two conferences with the United States Attorney concerning his approval of the proposed settlement.

11. That plaintiffs' attorneys were successful in consummating a settlement of the action under which the plaintiffs are to receive payments in the amount of \$17,352.08, which said settlement has been approved by the United States Attorney and the United States Maritime Commission.

12. That in addition to Messrs. Mowry & Mowry, plaintiffs' original attorneys, plaintiffs, through their said attorneys, also felt it advisable that they be represented by Edwin D. Hicks, Esq., because of his general experience and familiarity with federal practice, and Thomas H. Tongue III, Esq., because of his familiarity with the Fair Labor Standards Act.

13. That this case was filed before a final determination by the Oregon State Supreme Court on January 15, 1946, in the case of Fullerton v. Lamm upon the question of the constitutionality of the Oregon statute providing a six month period of

limitations in such cases, which said question had an important bearing on the recoverable amount of plaintiffs' claims against the defendant, and that, to the knowledge of plaintiffs' attorneys this case is the first action filed in this Court for unpaid overtime compensation under the Act since the submission of the Fullerton case to the Oregon Supreme Court.

14. That this is the first case in this Court involving a claim for unpaid overtime compensation under the Act against any Maritime Commission contractor which was subject to the requiring approval of settlements in such cases by the United States District Attorney Commission's general instructions to its contractors and the United States Maritime Commission in Washington, D. C.

15. That this case was taken by plaintiffs' attorneys on a contingent fee basis; that plaintiffs' attorneys have waived the right to any contingent fee or other compensation in connection with this action except such fee as may be approved by this Court, and except for a retainer fee in the amount of \$250.

16. That the schedule of minimum fees adopted by the Oregon State Bar Association specifies that for damage cases taken on a contingent basis the minimum fee after suit is filed, but before trial, shall be 25% and that for other cases taken on a contingent basis the minimum fee shall be 25%.

17. That based upon the foregoing and the experience of plaintiff's attorneys as lawyers and

practitioners before the above entitled Court a fee in the amount of \$3,500.00 is a reasonable fee to be allowed and approved by this Court for their services in connection with this case.

18. That subsequent to negotiation of a settlement in the above entitled case, as set forth above, together with the above agreement as to the amount of a reasonable attorneys' fee to be allowed in said case, it has been necessary for plaintiffs' attorneys to send letters to each of the 52 plaintiffs herein in order to secure approval of the amounts payable to each of said plaintiffs under said proposed settlement. It has also been necessary, by reason of the fact that defendant did not have accurate information concerning the dependency status for each of said plaintiffs for the purpose of computing deductions to be made from the amounts payable to said plaintiffs by virtue of federal income tax requirements, for plaintiffs' attorneys to again write to each of said 52 plaintiffs in order to secure the necessary information concerning the dependency status of said plaintiffs. In addition, it may also be necessary for plaintiffs' attorneys to secure from each of said plaintiffs a signed satisfaction of judgment before the amounts payable to each of said plaintiffs will be actually disbursed by defendant.

19. That also subsequent to said agreement for settlement and attorneys' fees it has been necessary for plaintiffs' attorneys to prepare and file motion and stipulation and judgment for dismissal without prejudice of said case insofar as the same relates

to the claim of James W. Fader in the amount of \$31.86, and the claim of Clinton A. Warriner in the amount of \$108.63.

Dated this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

[Endorsed]: Filed April 19, 1946.

[Title of District Court and Cause.]

STIPULATION WAIVING FINDINGS OF
FACT AND CONCLUSIONS OF LAW,
NOTICE OF ENTRY OF JUDGMENT,
RIGHT TO MOTION FOR NEW TRIAL,
AND RIGHT OF APPEAL

It is hereby stipulated by and between plaintiffs, acting through their attorneys herein, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., acting by and through its attorneys herein, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood, as follows:

1. That all of the parties to the above mentioned action do hereby waive findings of fact and conclusions of law in said action, notice of entry of judgment, the right to move for a new trial, and the right to appeal from the judgment entered by the above entitled Court in said action; and

2. That the judgment entered herein by the above entitled Court shall become final forthwith.

Dated at Portland, Oregon, this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

[Endorsed]: Filed April 19, 1946.

[Title of District Court and Cause.]

STIPULATION FOR JUDGMENT

It Is Hereby Stipulated by and between plaintiffs named in the complaint and supplemental complaint herein, acting by and through their attorneys herein, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., acting by and through its attorneys, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood, as follows:

Whereas:

1. Plaintiffs have instituted this action for the recovery of amounts claimed to be due to them as overtime compensation under the provisions of Section 7(a) of the Fair Labor Standards Act of 1938, referred to in the complaint and supplemental complaint herein and hereinafter as the "Act," and for the recovery of liquidated damages, attorneys' fees, and costs as provided in Section 16(b) of the Act;

2. Defendant has by its answer denied that it is indebted to plaintiffs, or to any of them, for overtime, liquidated damages, attorneys' fees, and costs, or any of such items:

3. This action has been dismissed without prejudice insofar as it relates in any way to the claim of James W. Fader and the claim of Clinton A. Warriner;

4. Questions of fact and of law have arisen with respect to the claims of plaintiffs against defendant

referred to in the complaint and the supplemental complaint herein regarding: (1) the number of hours, if any, in excess of forty (40) hours per week worked by plaintiffs, and each of them, for defendant; (2) the amount of time, if any, which plaintiffs, and each of them, were compelled to spend in reporting for roll call, inspection, and other duties before or after the time spent in the performance of their regular duties as described in Paragraph IV of the complaint; (3) whether such time was time worked within the meaning of the Act; and (4) whether the nature of the work performed by plaintiffs was such as to entitle them to the benefits of the Act;

5. A bona fide controversy and dispute, both as to facts and law, exists between plaintiffs and defendant regarding the right of plaintiffs to collect and receive, and the obligation of defendant to pay, the overtime compensation, liquidated damages, attorneys' fees, and costs claimed due to plaintiffs from defendant by reason of the matters referred to in the complaint and the supplemental complaint herein;

6. Plaintiffs and defendant desire to settle and adjust said controversy and dispute in the manner herein provided, and to agree and stipulate on the payments to be made to plaintiffs, and to their attorneys, by defendant in full settlement and discharge of all of the claims and demands of plaintiffs as set forth in the complaint herein; and

7. Plaintiffs and their undersigned attorneys

represent to defendant that each of said plaintiffs has authorized the settlement and adjustment of his claim against defendant set forth in the complaint and the supplemental complaint herein on the basis hereinafter stated:

Now, Therefore, It Is Hereby Stipulated and Agreed that judgment may be made and entered by the above entitled Court in favor of plaintiffs and against defendant, as follows:

1. For the payment by defendant to each of the plaintiffs of the sum set forth after his name on the schedule attached hereto, marked Exhibit A and by this reference made a part hereof; provided, however, that defendant may withhold from each sum deductions for federal income and social security taxes. The payment by defendant of the respective sums (less the mentioned deductions) to plaintiffs, respectively, shall, except for the matters hereinafter provided, be in full and complete satisfaction and discharge of all and every liability and obligation of defendant accrued prior to the date hereof to plaintiffs, and to each of them, pursuant to the Act, and particularly for overtime compensation and liquidated damages asserted to be due and payable by defendant to plaintiffs, and each of them, under and pursuant to the provisions of the Act.

2. For the payment by defendant to the attorneys for plaintiffs, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, of a reasonable

attorneys' fee for their services herein, in the sum of three thousand five hundred dollars (\$3,500.00).

3. For the payment by the defendant to plaintiffs of the costs of suit herein in the sum of seventeen and 48/100 dollars (\$17.48).

Dated at Portland, Oregon, this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

EXHIBIT A

Badge	Name	Total
3579	Macklin, L. I.....	\$ 348.56
3941	Maple, Len A.	560.10
91267	Hess, George W.....	223.73
3542	Yeo, R. F.....	598.95
6928	Sundberg, Erick E.....	300.63
6704	Stoneman, J. H.....	527.94
3906	Imus, W. G.....	626.67
48264	Culver, C. E.	428.42
86503	Warrick, A. F.....	196.02
3343	Hill, John J.....	630.70
21280	Knox, J. J.....	559.54
17574	Johnson, E. R.....	455.60

Exhibit A—(Continued)

3818	Williams, M. F.....	595.78
48557	Weigel, H. J.....	350.47
18046	Hanson, H. O.....	527.20
86234	Todd, Arthur B.....	215.68
86330	Holden, John T.....	118.86
3336	Rogers, S. M.....	188.30
6473	Chase, Daniel J.....	523.06
3694	Popma, John	641.97
86767	Nickels, George F.....	130.64
47677	Penniwell, R. J.....	464.03
3947	Craig, T. W.....	487.85
87231	Carlyle, Herbert J.....	60.65
87065	Bryant, James O.....	99.28
48662	Dean, G. G.....	60.81
3916	Cronin, J. E.....	531.02
1505	Carr, H. E.....	550.05
87090	True, G. O.....	89.18
85273	Rawls, O. L.....	334.41
48063	Peddicord, W. J.....	404.99
3640	Bjornsgaard, O. P.....	601.79
6867	Glennon, Arthur E.....	426.81
63869	Lancaster, Orval L.....	244.33
85703	Cox, W. J.....	279.75
86730	Krigbaum, Claude F.....	74.97
87222	Collier, L. W.....	67.80
30546	Van Hook, John H.....	426.66
85502	Johnson, Arthur E.....	305.54
6925	Nordeide, R. I.....	429.14
87074	Mainard, Lee	81.42
6877	Cash, B. L.....	437.32
3829	Hunt, Perry.....	103.17

Exhibit A—(Continued)

6822	Monrean, Charles H.	510.79
90447	Taulbee, W. T.	244.09
48453	Dopp, George E.	388.12
86865	Maynard, Theodore F.	74.74
48175	Long, Marion M.	241.22
85916	Griffin, W. C.	142.24
36056	Wilson, Charles J.	476.84
Total		\$17,387.83

[Endorsed]: Filed April 19, 1946.

In the District Court of the United States
For the District of Oregon
Civil No. 3000

L. I. MACKLIN et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

PROPOSED FORM OF JUDGMENT

The above-entitled cause came on for hearing before the above-entitled Court, Hon. James Alger Fee, United States District Judge, presiding, upon the issues presented by the complaint and supplemental complaint of plaintiffs and the answer of defendant, Kaiser Company, Inc., the plaintiffs appearing and being represented by their attorneys,

Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., appearing and being represented by its attorneys, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood; and

The Court having heard and considered said cause and having received the stipulation of the parties, acting by and through their aforesaid attorneys, that a judgment in said cause might be made and entered as hereinafter provided, and the cause having been submitted to the Court for decision, the parties having waived findings of fact and conclusions of law, and the Court being fully advised in the premises,

It Is Therefore Ordered, Adjudged, and Decreed as follows:

1. That in full and complete satisfaction and discharge of each and every claim set forth in the complaint and the supplemental complaint existing prior to the date hereof in favor of plaintiffs, and each of them, and against defendant, and particularly of all claims and demands accrued prior to to the date hereof of plaintiffs against defendant for overtime compensation and liquidated damages arising under or pursuant to the provisions of the Fair Labor Standards Act, that defendant, Kaiser Company, Inc., pay to each of plaintiffs the sum set forth after his name on the attached schedule (marked Exhibit A and by this reference made a part hereof), less deductions for federal income and social security taxes.

2. That defendant pay to plaintiffs' attorneys, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, the sum of...., which amount is hereby determined to be the reasonable value of the services rendered by said attorneys on behalf of plaintiffs in this cause.

3. That defendant pay to plaintiffs their costs of suit herein, in the sum of seventeen and 48/100 dollars (\$17.48).

Done in open Court this....day of April, 1946.

.....,

United States District Judge.

EXHIBIT A

[Identical to Exhibit A attached to the Stipulation for Judgment. See pages 25 to 27 of this printed record.]

In the District Court of the United States
For the District of Oregon

Civil No. 3000

L. I. MACKLIN, et al,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

Friday, April 19, 1946, A.M.

Before: Honorable James Alger Fee,
Judge. [1*]

Appearances:

MOWRY & MOWRY AND THOMAS H.
TONGUE III,

Of Attorneys for Plaintiffs;

THELEN, MARIN, JOHNSON & BRIDGES,
By MR. JOHNSON, AND

HART, SPENCER, McCULLOCH & ROCK-
WOOD, by

MR. FLETCHER ROCKWOOD,

Appearing for Defendant;

HENRY L. HESS,

United States Attorney.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

PROCEEDINGS

The Court: Civil 3000, Macklin versus Kaiser Company.

Mr. Tongue: May it please the Court, before proceeding to present the terms of settlement in this case for approval of the Court, I would like to submit a motion that the cause be dismissed without prejudice and without costs to either party in so far as the case relates to the claims of James W. Fader and Clinton A. Warriner. This motion is based on stipulation signed by the attorneys for the parties, your Honor. At this time I would like to present a proposed order to that effect.

The Court: Any objection? The order is granted.

Mr. Tongue: As the Court, I think, is well aware, this is a suit against Kaiser Company at its Swan Island Yard, brought under the Fair Labor Standards Act of 1938, by fifty-two of its employees and former employees—now fifty, following the order of dismissal for the two parties mentioned. [2]

These plaintiffs were employed by Kaiser Company as guards at its Swan Island Yard and claim that they had not been paid for one-half hour each day that they worked as a result of being required to report for duty, at least for the purposes of roll call and inspection, half hour before they actually went on their shifts. As a result of this claim by these fifty employees and former employees, the total wages claimed equal the sum of \$17,500.88, as alleged in the original complaint and supplemental complaint. There is also a claim for liquidated

damages in the same amount, that is, \$17,500.88. In addition, these plaintiffs request that the Court allow them as a reasonable attorneys' fee the sum of \$5,220.

The Company then filed a general answer—a general denial, I should say, which raised, among other things, the followings issues:

First, the number of hours, if any, over forty hours in any week that these men worked. The Company took the position that many of these men had been relieved early, and, even though they did report half an hour early, since they were released early there would be no overtime resulting. The Company also claimed that others of these plaintiffs had a lunch hour with pay, and that since that lunch hour equalled at least one-half hour there was no overtime, even if they were to be paid for this half an hour between roll call and going on shift.

Of course, the plaintiffs and their attorneys deny [3] these positions taken by the company and its attorneys.

The second principal issue that arose was the actual amount of time that was spent by these plaintiffs between reporting for inspection and roll call and going on their jobs. The Company took the position that many of them did not get there half an hour early, and certainly not at all times. They took the position that at least for a large part of the time these men did not get there half an hour early and did not get there any substantial amount of time before they actually went on shift.

Of course, the plaintiffs and their attorneys again denied this claim and an issue of fact resulted.

There is also the issue of law whether this standby time, as it might be called, between reporting for inspection and roll call and going on actual shift, was time worked within the meaning of the Fair Labor Standards Act, and then there is the question of whether all of these men, at least, were engaged in commerce, or in the production of goods for commerce, while they were engaged in this work. One way in which that question arose was that some of these plaintiffs, at least, were engaged in performing guard duties at the dormitories operated by the Yard, and there was a question of whether that constituted work related to commerce or necessary to the production of goods for commerce.

So that the Court can therefore see that this general [4] denial did raise substantial issues of both fact and law, including these issues that have been mentioned. As a result, and after a prolonged, very prolonged, series of negotiations, the attorneys for the plaintiffs reached an agreement that a fair settlement of these issues, including both the claims for back wages themselves and the claim for liquidated damages, would be to allow each man one-half hour at his regular rate of pay for each day that he worked, at the straight time or overtime rate, depending on the circumstances, and, as I say, this would represent a compromise not only of the claim for the overtime for the back wages themselves, but also a compromise of the claim for liquidated dam-

ages. As this is computed, the total amount to be paid under this settlement, leaving out the two plaintiffs with respect to whom the case has been dismissed, would total \$17,387.83.

Now, under the regulations, as I understand them, prescribed by the United States Maritime Commission, it is first necessary for the United State Attorney and the office of the U. S. Attorney General to give their approval, at least to the extent that a given case is a proper case to be subject to settlement. I understand that that approval has been given by Mr. Hess and by the office of the Attorney General. The U. S. Maritime Commission also reserves to itself the right to approve not only the basis of the settlement but the amount to be paid to each employee and, subject to the Court's approval, [5] of course, the amount to be paid as a reasonable fee to the attorneys for the plaintiffs, and this approval has also been given, and, if the Court thinks it advisable, I believe that Mr. Rockwood is prepared to present a photostat copy of that approval.

So we therefore submit, leaving aside for the moment the matter of attorneys' fees, a stipulation for the entry of judgment, a stipulation waiving findings of fact and conclusions of law, notice of entry of judgment and right of a motion for a new trial and right of appeal, and a proposed judgment based upon these stipulations.

I believe, your Honor, that completes the statement, except for the matter of attorneys' fees, unless counsel has some further comments to make or

unless the Court has some questions. Does the Court have any further questions?

The Court: No, I think not.

Mr. Tongue: Do you have anything to say, Mr. Rockwood?

Mr. Rockwood: No, if your Honor please, I think the situation presented by Mr. Tongue is satisfactory to the defendants. We are prepared to have the judgment entered, with the Court's approval.

Mr. Tongue: Does the Court desire to have a copy of the Martime Commission's approval?

The Court: I think in a public thing of this sort that it is my idea at this time that there be some proof submitted [6] to support the judgment. I am not going to simply rubber stamp somebody's findings in these things.

Mr. Tongue: You mean both as to the merits of the case and as to the matter of attorneys' fees? Is that correct?

The Court: I think it might be well for somebody to testify to the facts as the basis for settlement. If it is to be put under supervision as closely, where the Court acts on it, I think we had better have some testimony.

Mr. Tongue: Mr. Mowry advises me that none of his clients are here, so that there wouldn't be the benefit of testimony by any of the guards themselves, unless the Court desires to postpone the matter for that purpose. Of course, both the Mr. Mowrys have interviewed all of these people and can testify to that extent, as to the facts of their

claims, if that would meet the approval of the Court. Mr. Rockwood also tells me that Mr. Tuson, one of Kaiser Company's attorneys at the Swan Island Yard, is here in court and is prepared to testify as to the practice there and the way in which this arose, if that is felt necessary by the Court.

The Court: I don't want to make it burdensome, but this is the first time that this has come up. I think that there should be testimony in each of these cases to support the judgment.

Mr. Rockwood: Well, if your Honor please, I can call Mr. Tuson. He is a member of the Bar of the State of Idaho, but [7] not of the Bar of this Court or of Oregon. He has been engaged in the administrative work there at the Yard and it was under his supervision that these calculations were made upon which the settlement was arrived at, in so far as the Company is concerned.

The Court: I think that would be satisfactory.

Mr. Rockwood: I will call Mr. Tuson. [8]

WILLIAM TUSON

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: State your name.

A. William Tuson.

The Clerk: Will you spell it.

A. (Spelling) T-u-s-o-n.

(The witness was then duly sworn.)

(Testimony of William Tuson.)

Direct Examination

By Mr. Rockwood:

Q. By whom are you employed, Mr. Tuson?

A. By the Kaiser Company, Kaiser Company, Inc.

Q. At what location?

A. At the present time my office is at Swan Island Shipyard.

Q. In the City of Portland?

A. That is right.

Q. How long have you been employed by Kaiser Company, Inc., at the Swan Island Yard?

A. I have been employed by Kaiser Company since September of 1942. However, my office has been at Swan Island since about June, 1943.

Q. Prior to that time where were your headquarters?

A. My headquarters were at the Vancouver Shipyard.

Q. Of the same company?

A. That is right. [9]

Q. In what department were you working there at the Swan Island Yard?

A. In the Director of Industrial Relations. I was an assistant to the Director of Industrial Relations.

Q. And what was his name?

A. Mr. J. O. Murray.

Q. Did that department have supervision over the matter of wages, hours, working conditions and

(Testimony of William Tuson.)

contracts with labor unions and relations generally with employees of the yard? A. Yes.

Q. And were you familiar in your work with such matters, as they affected the defendant, at that yard?

A. I didn't understand your question.

Q. Were you familiar with the matters handled by that department at the Yard during the period that you were engaged at the Yard? A. Yes.

Q. Were you advised at the time of the filing of the complaint of this case, Macklin against Kaiser Company, Inc.? A. Yes.

Q. Tell us what you have done by way of checking of the claims of the various individuals who are included in this complaint to determine whether or not the men had worked, to determine the extent of time that they had worked on particular days and in particular weeks, and to determine the character of the work which was performed by them. Tell us, very generally, what you [10] did.

A. I first received a copy of the complaint, which I read, and then I contacted Captain Utley, who was the immediate supervisor of the plaintiffs and other guard employees in the Swan Island Yard. I went into detail with him as to the requirements of these men in reporting early, what instructions had been given the men, what the actual practice was in regard to the men reporting early, also what the practice was in regard to lunch periods, and whether or not—or, rather, what type of work was being performed in the yard during the period of time

(Testimony of William Tuson.)

covered by the complaint. I then checked with the payroll department and had them make a listing, which was done mechanically by IBM machines,—

Q. “IBM”—International Business Machines?

A. Yes, sir,—running a payroll day by day of each one of these plaintiffs, setting up the amount of time that each plaintiff had worked each day as guard while in our employ. We then computed the number of hours that each guard had worked each week.

Q. Have you read the stipulation which was presented to the Court this morning for a judgment, which has attached to it as Exhibit A a tabulation with the list of some fifty individuals, with amounts set opposite their names, and totalling \$17,-387.83?

A. I have.

Q. What did you have to do with preparing the data which [11] resulted in that Exhibit A?

A. I got that data from the listing that the payroll department had made. I might add that after the number of hours that each employee had worked per week was compiled we then added to each day that the employee had worked an amount of time of one-half hour. We multiplied that one-half hour by the employee's regular rate of pay where the time that he had worked during the week plus the one-half hour per day was less than forty hours work per week, and to the extent that that amount was over forty hours per week we multiplied the half hour allowance per hour by time and a half his regular rate of pay, and did that for each week,

(Testimony of William Tuson.)

and in that way compiled or computed the amounts that are set opposite each name on the exhibit.

Q. Is this Exhibit A a correct tabulation of the data computed in the manner that you have just described? A. It is.

Q. From the records at Swan Island Yard were you able to determine the fact as to the particular individual whether or not on a particular day he did work thirty minutes in addition to the time shown on the payroll?

A. We didn't have adequate records to show that. All that I could find out was what our general practice was. At the start of the construction of the shipyard a pamphlet was issued of instructions to guard employees. In that pamphlet guard employees were told that they would be required to report to the [12] guard station one-half hour before the regular shift changed time, in order to stand inspection, answer the roll call, and receive assignment of duties. However, from an actual practice that particular rule was never enforced. The roll call time gradually got later and later, and if a man was late he wasn't penalized, or anything of that nature, for coming in late.

Q. Well, from your investigation did you determine the fact to be that in some instances, the extent of which is indeterminate, men would report as little as five minutes before a shift time?

A. I was told that, but we had no records to prove that.

Q. And from your investigation, then, you de-

(Testimony of William Tuson.)

terminated the actual time that they reported in advance of shift time was variable, from a very few minutes up to maybe a maximum of thirty minutes?

A. That is right.

Q. So that the fact is that the method of computation which you used perhaps overstates greatly the actual time in excess of forty hours a week that the men worked—or the actual time in excess of the time shown on the payroll that the men actually worked?

A. That is right.

Q. Did you participate in the conference with plaintiffs' attorneys which led up to this stipulation which is now presented to the Court?

A. I have. [13]

Q. Is it a fact that the amount arrived at in Exhibit A is a compromise between the parties which they arrived at in recognition of the impossibility of proof of the actual facts?

A. That is correct.

Mr. Rockwood: I have nothing further, your Honor.

Mr. Tongue: I would like to ask a question, if I may, your Honor.

Cross-Examination

By Mr. Tongue:

Q. Mr. Tuson, you have testified that so far as the Company could determine these men reported for work in advance of going on shift anywhere from a few minutes in advance of shift time to as much as half an hour, is that correct?

(Testimony of William Tuson.)

A. Yes.

Q. I would like to ask this question, Mr. Tuson: What would be the sum payable to these men if they were given credit for fifteen minutes each day that they worked but were also paid not only the amount of their claimed back wages but an equal amount for liquidated damages? Would that amount be greater or less, or the same, than the amount as prepared by your computations?

A. It would be slightly less, for the reason that in these computations these men were allowed one-half hour at straight time where their total hours for the week were less than forty. Now, my understanding, we would not be required to pay [14] liquidated damages on that amount.

Q. Your computation, though, assumes that it is a compromise of both back wages and liquidated damages, is that right?

A. That is right, yes.

Q. And no additional equal amount is added as liquidated damages in your computation?

A. Not as such. We arrived at a formula in estimating an amount for settlement of all claims lodged by the plaintiffs.

Q. Both for overtime and for liquidated damages? A. All claims. Yes.

Mr. George Mowry: If your Honor please, if your Honor should not be satisfied with the testimony of Mr. Tuson as the basis for compromise and judgment, we would like to have an opportu-

(Testimony of William Tuson.)

nity to call some of the guards. We have talked to them and——

The Court: The Court is of opinion that this is not the ordinary type of a lawsuit, but that it has public basis, which should be supported by a public hearing. At that public hearing the Court is of the opinion both sides should present certain testimony as to the fairness of the settlement, and likewise the Court is of the opinion that some representatives of plaintiffs besides their attorneys should be present in Court, because the policy of the Court that it has been following in pre-trial conferences in having the parties to civil controversies in court is of a very salutary nature. This is really taking the place [15] of a pre-trial conference, and if it is a judicial matter at all I think the parties should be present, at least by their representatives, and I mean by that not the lawyers but by representatives from each side.

Mr. George Mowry: We will be glad to do that.

The Court: Can you have them here at 2:00 o'clock?

Mr. George Mowry: That I think would be almost impossible, your Honor, because, of course, we had expected—of course, I am frank to say, I am no authority on Federal procedure, and my brother isn't either—we had expected that this matter would be disposed of without taking of testimony. For that reason we have no guards here on call. We could get them here easily by the middle of next week, a very considerable number of them.

(Testimony of William Tuson.)

The Court: Well, inasmuch as this is the first case of this type, unless there is objection by the other parties—I might say that I thought I had given sufficient warning to everybody that this is a type of proceeding that the Court would feel was necessary to support this type of a settlement, and unless there is serious objection I am inclined to favor the idea that this should go over.

Mr. Tongue: Your Honor, I don't object at all, but I do have here a document, which I think might satisfy the Court, concerning the instructions given by the Company to the men to sustain their position that one-half an hour—— [16]

The Court: That isn't my point. My point is that I think that there should be some representatives of the plaintiffs themselves in Court. That is my point.

Mr. George Mowry: If your Honor please, these gentlemen whispered to me and asked if we had the written approval of these plaintiffs to this settlement. We have the written approval of fifty-one of the fifty-two, and of course that includes this entire fifty, that they all approved this settlement in writing. We have those documents and could bring them up here and would be glad to do that.

The Court: I am of the opinion that if this is a judicial proceeding at all—and apparently it is—the representatives of the plaintiffs should be present in court, and I mean by that not their lawyers. Now, I am trying to be very emphatic about that.

(Testimony of William Tuson.)

In other words, if I am going to enter a judgment on the settlement, bring them in here.

Mr. George Mowry: We will bring them in. We can bring in most of them.

The Court: When would you like to have it go over to?

Mr. George Mowry: I would like to have it go over to Wednesday or Thursday. I think by that time we could get most of them in here.

Mr. Rockwood: I have no objection, of course, to it going over as the Court suggests. I do say this, that my own program, personally, from Wednesday on next week and for the next [17] about ten days makes it almost impossible for me to participate in any such hearing. There are Interstate Commerce matters taking up at the end of the week. Then I am going out of town at the end of next week and into the following week. Can we have it Tuesday?

Mr. George Mowry: Yes, I will say that, to accommodate Mr. Rockwood, I can get most of them here Tuesday.

The Court: I am not insisting that they all be here. I am saying we should have certain representatives. We are dealing with delicate matters here, and I think that these matters should not be presumed upon. And at that time, likewise, I shall expect you to introduce testimony as to the reasonableness of the attorneys' fees.

Mr. Tongue: I might say, your Honor, that we have in Court two gentlemen to support our request

(Testimony of William Tuson.)

in that connection. If it would be suitable to the Court, I believe it might accommodate them if we can proceed to present that portion of the case this morning, leaving for next Tuesday the remaining portion of the case relating to the settlement of the case on its merits.

The Court: Well——

Mr. Rockwood: Mr. Tuson is excused, is he?

The Court: Yes.

(Witness excused.)

The Court: I might say that it makes it a little easier and I would rather have the plaintiffs whole proceeding, but [18] in view of the fact that this is the first case of this type and that everybody will be on notice in the future as to what the Court is going to expect, if you have your experts on attorney fees I will hear them.

Mr. Tongue: It is entirely agreeable, your Honor, to let the entire matter go over until Tuesday of next week. Counsel has requested that, if it is agreeable to the Court, we be allowed to proceed on the matter of attorneys' fees.

The Court: Yes.

Mr. Tongue: In that connection, your Honor, we are prepared to proceed in either of two ways, depending upon the desires of the Court. All of the attorneys for the plaintiffs, with the exception of Mr. Edwin Hicks, are present in court and available to testify. We also have present two disinterested attorneys, Mr. Gunther Krause and Mr. Sid-

ney Graham. If, however, the Court is interested in expediting the proceeding, we have prepared a stipulation as to what plaintiffs' attorneys would testify to if called and could support that by testimony of Mr. Krause and Mr. Graham, and supplemented by testimony on the part of plaintiffs' attorneys on any points that the Court may desire to have further developed.

The Court: Yes. You may proceed.

Mr. Tongue: Do you wish to receive this stipulation, your Honor?

The Court: Yes. [19]

Mr. Tongue: To save the time of the Court, I will hand it to the Court to read for himself.

The Court: Call your witness.

Mr. Tongue: Mr. Gunther Krause. [20]

GUNTHER F. KRAUSE

was thereupon produced as a witness in behalf of the plaintiffs herein and, having been first duly sworn, was examined and testified as follows:

Mr. Tongue: May it please the Court, I think it might expedite the proceeding if your Honor might read the stipulation before examining Mr. Krause, as his testimony is based largely upon those facts.

The Court: Go right ahead.

Mr. Tongue: Very well.

Direct Examination

By Mr. Tongue:

Q. Will you please state when you were first admitted to the Bar of the State of Oregon?

(Testimony of Gunther F. Krause.)

A. 1922.

Q. Have you taken part in cases involving labor controversies? A. Yes, I have.

Q. In what capacity, Mr. Krause?

A. Well, in cases under the Fair Labor Standards Act I represented both the claimants and the employers.

Q. During what period of time have you engaged in such controversies?

A. Oh, since the passage of the Act, when claims first were made; from 1938 on, I guess.

Q. Have you ever had occasion to advise employers concerning the amounts of fees to be allowed attorneys for employees in [21] suits under the Fair Labor Standards Act as reasonable attorneys' fees?

A. Yes, I have had to tell them what I considered a reasonable fee to be, and they paid as attorneys' fees, generally, what I recommended.

Q. Have you also been in the position of advising employees in the same respect?

A. Yes, I have.

Q. Are you familiar with the practice of other attorneys and of employers and claimants in similar cases?

A. Yes, I have discussed this matter with attorneys representing employers and claimants in quite a number of cases.

Q. Mr. Krause, have you read the stipulation which has been presented to the Court as to what the plaintiffs' attorneys would testify if called and

(Testimony of Gunther F. Krause.)

sworn as to the nature and extent of their services in this case?

A. Yes, I have read the stipulation.

Q. Assuming a hypothetical case involving facts identical with those set forth in this stipulation, would you be prepared to express an opinion as to the reasonable value of attorneys' fees in such a case?

A. Yes.

Q. What is your opinion, under such circumstances?

A. Well, a reasonable fee in this case would be from thirty-five to forty-five hundred dollars, in my opinion. [22]

Q. Would you please state the basis upon which you express that opinion?

A. Well, I have taken into account the time consumed, spent, by the attorneys in a matter of this sort. It by no means is limited to the time that the attorneys for the claimants were actually engaged on this case. Anyone that is going to handle any cases under the Fair Labor Standards Act has a good deal of work to do besides ascertaining the facts of the case and looking up the law, and particularly on the questions raised by this case. Based on the law and the amount of time and the difficulties in cases of this character, the ability of the attorneys representing the employer, taking all those factors into consideration, it is my opinion that an attorneys' fee of about twenty-five per cent. of the amount recovered would be reasonable. \$3500 is below a twenty-five per cent. figure, and I think

(Testimony of Gunther F. Krause.)

that \$3500 is on the low edge of what is reasonable in a case of this kind.

Q. Mr. Krause, does that figure conform with allowances which you yourself have recommended to employers?

A. Well, I have not often been able to get away with an attorney's fee of twenty-five per cent. I have had to pay, while representing employers, a very much larger percentage than that in a good many cases, although the total amount involved was much smaller than this one, and that, of course, justifies a difference in the percentage rate. [23]

Q. Do you feel that the figure which you have expressed as your opinion of a reasonable attorneys' fee coincides with your own experience and with the cases which you have observed of a similar nature?

A. Yes, it is well within the range of what I have paid and received, having in mind the differences in the amounts involved, the total amounts and the number of claims involved.

Mr. Tongue: That is all, your Honor.

Mr. Rockwood: I have no questions.

Mr. George Mowry: If your Honor pleases—oh, is the witness excused?

The Court: Yes.

(Witness excused.)

Mr. George Mowry: If your Honor pleases, Mr. Rockwood has stated that he was leaving for San Francisco very soon—I think Mr. Krause said he was also——

Mr. Krause: Yes, Sunday.

Mr. George Mowry: —and, therefore, he could not be here next week to testify. I have consulted Mr. Graham and he says he can be here, and it would suit me a little bit better to see how much further this case is going to go in the way of evidence before these attorneys' fees are going to be passed on, and as far as Mr. Graham is concerned it would suit us a little better if he returned Tuesday.

The Court: The Court has already expressed the idea that [24] the balance go over until Tuesday. It makes no difference. I will hear you now or on Tuesday, just as you wish.

Mr. Tongue: May it please the Court, may we then request that the entire remaining matters go over until next Tuesday at 10:00 o'clock, if that is satisfactory?

The Court: Very well, Tuesday at 10:00 o'clock.

(Whereupon, at 11:15 o'clock a.m., Friday, April 19, 1946, proceedings in the above-entitled matter were continued to Tuesday, the 23d day of April, A.D. 1946, at the hour of 10:00 o'clock a.m.) [25]

Tuesday, April 23, 1946, 10:30 A.M.

(Proceedings in the above-entitled cause were resumed and continued as follows:)

The Court: Macklin, et al., plaintiffs, versus Kaiser Company, Inc., defendant:

As I understand the procedure this morning, the plaintiffs will call certain representatives of members of the plaintiffs' group to testify regarding—

Mr. George Mowry: Yes, your Honor. We are going to call, first, Mr. Culver. Before we call him, I would like to make this statement to the Court, that this complaint, as your Honor will undoubtedly recall from the pleadings, is based upon the idea that all of these men have worked thirty minutes, or were on duty thirty minutes, or were on the premises thirty minutes, for which they received no pay. Now, after Friday we contacted all the guards we could by telephone, and among them Mr. Maple, who is the second man in the complaint. The complaint alleges that he went to work in 1942 and that during all the time he was there he worked or was on duty this extra thirty minutes. Yesterday, for the first time that I had ever heard of or that my brother had ever heard of, he announced to us that he thought that for the first six months, maybe the first year, they were only on duty twenty minutes of this extra time. I haven't heard that from anybody else, but in view of the fact that he makes that statement it may be possible that we would want to amend [26] the complaint as to him. He has made that statement and I have so advised the attorneys for the defendant.

Shall I call a witness, your Honor?

The Court: Yes, if you will.

Mr. George Mowry: We will call Mr. Culver. Will you take the stand right over there, Mr. Culver. [27]

CLARENCE E. CULVER

one of plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs and was examined and testified as follows:

The Clerk: Will you state your full name, please.

A. Clarence E. Culver.

The Clerk: Clarence E.? A. Yes.

The Clerk: How do you spell your last name?

A. (Spelling) C-u-l-v-e-r.

(The witness was then duly sworn.)

The Clerk: Clarence E. Culver.

The Court: Just a moment. I note that there is no representative of the United States Attorney's office present. I understand he is an important member of this group. Will you have Mr. Hess called. Court will be in recess until Mr. Hess comes in.

(A short recess was thereupon had, following which the presence of the Honorable Henry L. Hess, United States Attorney, was noted, and proceedings herein were resumed and continued as follows:)

Direct Examination

By Mr. George Mowry:

Q. Your name is Clarence E. Culver?

(Testimony of Clarence E. Culver.)

A. Yes, sir.

Q. Now, you will have to keep your voice up a little bit. [28]

A. Yes, sir.

Q. And you are at the present time a resident of Portland?

A. Right.

Q. Vanport—or Guild's Lake?

A. Guild's Lake.

Q. And you are employed by whom?

A. By the Electric Steel Foundry.

Q. Now, did you formerly work for Kaiser Company, Inc., at their Swan Island Shipyard?

A. Yes, sir.

Q. When did you come to the State of Oregon?

A. February 25, 1943.

Mr. Rockwood: Nineteen forty—what?

Mr. George Mowry: '43. You said '43?

A. Yes.

Q. Keep your voice up, Mr. Culver, and answer audibly.

The Court: February 25, 1943, is that correct?

Mr. George Mowry: I think that is right, isn't it?

A. Right, yes, sir.

Q. Speak a little louder. Now, what is the fact as to whether you came out here at the request of anybody?

A. By the Kaisers, who was soliciting help.

Q. In Oklahoma?

A. Yes.

Q. I see. And, not to go into any great detail, if I may ask [29] a leading question or two, when you came out here you went to work for the Oregon Shipbuilding Corporation?

A. Yes, sir.

(Testimony of Clarence E. Culver.)

Q. Immediately after you got here?

A. Yes, sir.

Q. And you worked for them for about how long?

A. With the Oregon Shipbuilding?

Q. Yes.

A. Until July, or June—about June, I would say in June.

Q. 1943? A. Right.

Q. Then when did you go to work for the Kaiser Company, Inc.? A. Swan Island?

Q. At Swan Island?

A. July—approximately July 25th—or approximately.

Q. July what? I believe you have the copy of the payroll or the record submitted by the Kaiser Company, Inc.? A. Yes.

Q. And their record shows you went to work as a guard on July 24th, 1943? A. Yes.

Q. At a pay of 95 cents per hour?

A. Right.

Q. That is correct, is it? A. Right. [30]

Q. Now, when you went to work for the Kaiser Company, Inc., in July of 1943, did you have another job at that time—up to that time? A. Yes.

Q. And, without going into a lot of detail, it wasn't a shipbuilding job? A. No.

Q. And whom did you consult about getting this job as a guard at Swan Island?

A. Clarence Krause.

Q. No, I mean who did you consult at the Yard?

(Testimony of Clarence E. Culver.)

A. Captain Utley.

Q. Captain Utley; and he is Captain of what there? A. Captain of the guards.

Q. He was at that time? A. Yes.

Q. And in the conversation you had with him did he say he would give you a job as a guard?

A. Yes.

Q. And how long after that conversation was it that you went to work as a guard?

A. Oh, three or four days.

Q. Now, before you actually went to work as a guard did you have any further conversations with Captain Utley? A. Before I went to work? [31]

Q. Yes. A. Yes.

Q. And what is the fact as to whether he gave you certain instructions as to what your duties were to be and what shift you were to be on, and other instructions of that kind? A. Yes.

Q. Speak up a little bit louder. Now, what is the fact as to whether he also instructed you at the same time upon any other subject aside from your general duties? A. The question again, please?

Q. I say, did he give you instructions on other subjects aside from your shift, and so on?

A. Yes.

Q. And about what?

A. Reporting for roll call.

Q. And what instructions did he give you about reporting for roll call?

A. To report thirty minutes before going on duty.

(Testimony of Clarence E. Culver.)

Q. I can't hear you very well. Thirty minutes before going on duty? A. Yes.

Q. And, incidentally, what shift did he assign you to? A. The graveyard shift.

Q. And the graveyard shift for the guards was to commence at what hour?

A. At 12:00 o'clock. [32]

Q. Midnight? A. Right.

Q. And was to last until what hour?

A. 8:00 o'clock A.M.

Q. And his instructions to you, as I understand it, were to report for roll call half an hour prior to midnight? A. 11:30, yes.

Q. I see. Well, now, you then went to work as a guard? A. Yes.

Q. On the graveyard shift? A. Yes.

Q. It that right? A. Right.

Q. Now, just to get a little picture of the premises there, you were living at that time at what place? A. Vanport.

Q. What? A. Vanport City.

Q. Now, Vanport is quite a ways north of Swan Island? A. Yes.

Q. Now, incidentally, Swan Island is located in the City of Portland? A. Yes.

Q. On the east bank of the Willamette River, is that right? A. Right. [99]

Q. And as you went to work, from day to day, or night to night, approaching Swan Island which way did you go into it, from the east or the west?

A. From the east.

(Testimony of Clarence E. Culver.)

Q. And I believe you cross the Union Pacific Railroad tracks as you go? A. Yes.

Q. And when you get across the tracks what is the fact as to whether you are then on the premises of the Kaiser Company, Inc., Swan Island Shipyard properties? A. Yes.

Q. And you might mention, briefly, some of the buildings that you pass on your way to where you reported for this roll call. Incidentally, where did you report for the roll call, what building?

A. At the guard office.

Q. At the guard office. Now, what buildings of Kaiser Company, Inc., at Swan Island did you pass as you went on to this guard office?

A. On the right?

Q. Yes, on the right-hand side?

A. The first buildings would be the gas buildings.

Q. The what? They would be what?

A. The acetylene gas buildings.

Q. Well, it would be the oxygen gas building?

A. Yes, the oxygen gas building.

Q. Which is maintained there by the company?

A. Yes.

Q. All right, what else?

A. The vocational building.

Q. The Vocational building. A. Yes.

Q. That, as you proceed west, is on the right-hand side? A. On the right-hand side.

Q. And what do they do in the Vocational building?

(Testimony of Clarence E. Culver.)

A. I am sure that is where the welders, and possibly others, received their training.

Q. All right, what is the next building you went to as you went west?

A. I would say the Child's Center.

Q. And that is for what?

A. Where the parents left their children, who were working in the Yard.

Q. And then as you proceeded along to the west I believe you turned to the north then?

A. Yes.

Q. And you passed what other buildings then?

A. The dormitories is on the right.

Q. Well, what other buildings?

A. The cafeteria. [101]

Q. The cafeteria where the workers were fed?

A. Got their meals, yes.

Q. I see. And then what other principal buildings did you pass before you got to your guard office?

A. The Administration buildings.

Q. How many of them? A. There's two.

Q. Two. And which one is the main Administration building?

A. I believe the second one.

Q. The second one? A. Yes.

Q. And that is about how close to the guard office?

A. Oh, I would say half a city block.

Q. Half a block? A. Approximately.

Q. Now, I will ask you this, Mr. Culver: You worked there from the time you went to work as a guard there at the Swan Island Shipyards of

(Testimony of Clarence E. Culver.)

the defendant—you worked there how long? Now, it was late July——

A. From July, '43, until February of '45.

Q. That is February, what date?

A. The 27th, I believe.

Q. February 27th, 1945. And what is the fact as to whether your employment there was practically continuous? A. Pardon? [36]

Q. Was your employment there continuous during that period? A. Yes.

Q. And what shifts did you work on?

A. The graveyard shift.

Q. And only the graveyard shift?

A. Only the graveyard.

Q. Now, I will ask you, if it is a fact, as to whether or not this instruction which Captain Utley gave you at the beginning about reporting for roll call half an hour early was ever changed in any way? A. No.

Q. Or modified? A. No.

Q. Or withdrawn? A. No.

Q. And I will ask you what is the fact as to whether during the entire period that you worked there, or on any night that you went to work—it was a midnight job, as I understand it—what is the fact as to whether invariably you first appeared at a roll call? A. Yes.

Q. And that roll call, with the attending circumstances, lasted about how long?

A. Oh, approximately eight to twelve or fifteen minutes.

(Testimony of Clarence E. Culver.)

Q. Now, what is the fact as to whether from the time the roll [103] call started you ever left the premises known as the Swan Island Shipyards?

A. No.

Q. Not until the end of your shift? A. No.

Q. You were on the premises continuously?

A. Yes.

Q. I see; and what is the fact as to whether you have never been paid any portion whatever of any wages for this half hour— A. No.

Q. —that occurred—wait a minute—for the first half hour after the beginning of roll call?

A. No.

Mr. George Mowry: Could I have that question read, your Honor?

The Court: Yes, read the question.

Mr. George Mowry: Will you read it, Mr. Rauch.

(The question referred to and the answers thereto were thereupon read.)

Mr. George Mowry: That is all right.

Q. Now, Mr. Culver, I believe those figures which you agreed to that were submitted by the Kaiser Company show that after going to work on July 24th as a guard as 95 cents per hour you then, on October 4, 1943, were given \$1.05 an hour for the same services as a guard? A. Yes. [38]

Q. Is that right? A. That is right.

Q. And that rate of \$1.05 per hour as a base pay then continued until you finally quit or were laid off February 27, 1945, is that true?

(Testimony of Clarence E. Culver.)

A. That is right.

Q. Now, then, you have made some computation of the wages or the money that you would be entitled to for this extra half hour at the rate at which you were being paid during those respective periods, have you not? A. Have what?

Q. You have—it has been brought to your attention—— A. Yes.

Q. —what your entire wages would have been for that half hour at the hourly rates which you were getting at those times? A. Yes.

Q. What is that amount, approximately?

A. Four hundred twenty-eight dollars and some cents.

Q. I think the figure is seventy-two cents,—\$428.72. Now, have you ever been paid any part of that figure? A. Pardon?

Q. How is that? A. The question, again?

Q. I say, have you ever been paid any part of that amount? A. No [39]

Mr. George Mowry: Now, Mr. Culver,—will you show this writing to the witness.

The Bailiff: Do you want it marked for identification?

Mr. George Mowry: Yes, I would like to have it marked for identification, with the understanding that it may be withdrawn and copy submitted, your Honor.

(Letter bearing date March 27, 1946, Mowry & Mowry, to C. E. Culver, so produced, was thereupon marked for identification as Plaintiff's Exhibit 1.)

(Testimony of Clarence E. Culver.)

Q. (By Mr. George Mowry): I ask you to look at Plaintiff's 1 for identification and see if that is your signature under the word "Approved"?

A. Yes.

Q. And that letter is dated as of March 27th, is it not, 1946? A. Yes.

Q. It is dated up in the right-hand corner.

A. 1946, yes.

Q. How? A. Yes.

Q. Speak a little louder. What date is it?

A. 1946.

Q. What month?

A. March, the best I can see without my glasses.

Q. Oh, I see. I think it is March 27th. [40]

A. 27th, yes, that is correct.

Mr. George Mowry: 1946. Would your Honor like for me to read that letter to your Honor?

The Court: No. I can read.

Mr. George Mowry: Yes, I appreciate that. I thought—it is a short letter. It simply sets out that the Company has agreed——

The Court: Do you want to put it in evidence?

Mr. George Mowry: We offer it in evidence.

Mr. Rockwood: May I see it, please?

Mr. George Mowry: Certainly.

The Court: Show it to Mr. Rockwood.

Mr. Rockwood: We don't object to the receipt of this exhibit in evidence. However, there are some statements in there that we do not consider binding on the defendant. There is a possibility of, maybe,

(Testimony of Clarence E. Culver.)

a little ambiguity as to the extent of this compromise settlement. There is no mention in there of the question of liquidated damages, and this settlement is in settlement of all claims, overtime and liquidated damages, but the letter which is addressed to this witness does not mention the question of liquidated damages.

The Court: Admitted.

(The letter referred to, so offered and referred to, having previously been marked for identification, was thereupon marked received as Plaintiff's Exhibit 1.) [41]

PLAINTIFFS' EXHIBIT No. 1

Law Firm of Mowry & Mowry
1218 Failing Building
Portland 4, Oregon

March 27, 1946

[In Pencil]: 5147 Buena Ave.,
Guilds Lake, Portland.

Mr. C. E. Culver
7824 S. E. Lambert
Portland, Oregon

Re: Macklin, et al, v.
Kaiser Co., Inc. No. 3000

Dear Sir:

The back wages due you, and the fifty-one other plaintiffs in the above-entitled Federal Court suit,

(Testimony of Clarence E. Culver.)

from the Kaiser Co., Inc., for your work at the Swan Island Shipyard have now been approved in writing by the United States Maritime Commission. The amount that has been approved in respect to yourself is the sum of \$428.42. According to the figures presented to us from the books of Kaiser Co., Inc., this is the amount in full of all of your unpaid minimum wages and unpaid overtime compensation. From this amount, however, will, of course, be deducted the amounts for your withholding tax and Social Security reservations.

If you are willing to accept this amount, as above computed, in settlement, please write your signature under the word "Approved" at the bottom of this letter and return the letter, as thus signed, to us promptly, as we wish to be able to present such letters to the Federal Court at the time the settlement is finally submitted to that Court.

As soon as this settlement is approved by the Federal Court individual releases will be mailed to you and the others and upon return of your release at that time you will receive your check for the amount agreed upon.

Very truly yours,

MOWRY & MOWRY,

By /s/ GEORGE MOWRY.

Approved:

/s/ C. E. CULVER.

Received.

[Endorsed]: Filed April 23, 1946.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: Now, I wonder if you gentlemen—Mr. Rockwood, I wonder if you gentlemen would be willing to stipulate that we have here fifty other letters from fifty other guards in the identical form, signed by them?

Mr. Rockwood: Well, if I may see them I will so stipulate.

Mr. George Mowry: You may. There are forty-seven—it is the same amount as in the stipulation. There are forty-seven of them—pardon me just a minute—pardon me, here is the forty-eighth. I would appreciate it if you would keep those separate from each other. Here's forty-eight, forty-nine, fifty, fifty-one.

The Court: If you have the letters there, you will tender them in evidence.

Mr. George Mowry: I beg your pardon?

The Court: I say, if you have the letters there you will tender them in evidence.

Mr. Rockwood: Forty-six have been handed to me, according to my count. We haven't had an opportunity to check against the amounts stated with the amounts shown in the stipulation for judgment, nor have we had a chance to check the names of the individuals to whom these letters are addressed, or by whom signed, against the stipulation.

Mr. George Mowry: Well, you don't question the signatures?

Mr. Rockwood: No, no, not at all.

Mr. George Mowry: Now, if your Honor please,

(Testimony of Clarence E. Culver.)

he says there [42] are forty-six. There are forty-six in addition to the Culver letter in this file.

Mr. Rockwood: That is right.

Mr. George Mowry: And I presume we could offer them in evidence as one exhibit?

The Court: Yes.

(The forty-six letters referred to, all bearing date March 27, 1946, from Mowry & Mowry, addressed to the various plaintiffs listed below and contained in a folder, so offered and received, were thereupon marked received as Plaintiff's Exhibit 2: O. L. Rawls, John H. VanHook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, Geo. F. Nickels, Geo. W. Hess, Marion M. Long, O. P. Bjorsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, [43] B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, [44] W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson, and Richard F. Yeo.)

(Testimony of Clarence E. Culver.)

PLAINTIFFS' EXHIBIT No. 2

Law Firm of Mowry & Mowry
1218 Failing Building
Portland 4, Oregon

March 27, 1946

Mr. O. L. Rawls
Bldg. 2910—Apt. 3772
No. Broadacres
Vanport City
Portland 17, Oregon

Re: Macklin, et al. v.
Kaiser Co., Inc. No. 3000

Dear Sir:

The back wages due you, and the fifty-one other plaintiffs in the above-entitled Federal Court suit, from the Kaiser Co., Inc., for your work at the Swan Island Shipyard have now been approved in writing by the United States Maritime Commission. The amount that has been approved in respect to yourself is the sum of \$334.41. According to the figures presented to us from the books of Kaiser Co., Inc., this is the amount in full of all of your unpaid minimum wages and unpaid overtime compensation. From this amount, however, will, of course, be deducted the amounts for your withholding tax and Social Security reservations.

If you are willing to accept this amount, as above computed, in settlement, please write your signature under the word "Approved" at the bottom of this letter and return the letter, as thus signed, to us promptly, as we wish to be able to present such letters to the Federal Court at the time the settle-

(Testimony of Clarence E. Culver.)

ment is finally submitted to that Court.

As soon as this settlement is approved by the Federal Court individual releases will be mailed to you and the others and upon return of your release at that time you will receive your check for the amount agreed upon.

Very truly yours,

MOWRY & MOWRY,

By /s/ GEORGE MOWRY.

Approved:

/s/ O. L. Rawls.

[“Exhibit 2 also includes identical letters to John H. Van Hook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, George F. Nickels, George W. Hess, Marion M. Long, O. P. Bjornsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson and Richard F. Yeo.”]

Received.

[Endorsed]: Filed April 23, 1946 U.S.D.C.

[Endorsed]: Filed Oct. 16, 1950 U.S.C.A.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: Now, here, Mr. Rockwood, are the forty-eighth, forty-ninth, fiftieth and fifty-first.

Mr. Rockwood: Mr. Mowry, you will stipulate that those letters were written by you and addressed to the claimants, and, to the best of your knowledge, they are their signatures?

Mr. George Mowry: Oh, I will testify that they are their signatures.

Mr. Rockwood: You state that these are the forty-eighth, forty-ninth and fiftieth?

Mr. George Mowry: That is right.

Mr. Rockwood: One of these that you handed to me, which is a form letter similar to the others, is apparently signed by Mr. Warriek.

Mr. George Mowry: Yes.

Mr. Rockwood: Another is a letter, in similar form, apparently signed by Mr. Peddicord.

Mr. George Mowry: Yes. [45]

Mr. Rockwood: Then the two files, one relating to Hunt and the other one relating to L. I. Macklin, the named plaintiff.

Mr. George Mowry: Macklin is in there in an envelope.

Mr. Rockwood: That is right, there is a form letter for Macklin, but none for Hunt.

Mr. George Mowry: No. Now, so far as Mr. Hunt is concerned, as some of you gentlemen know—Mr. Tongue knows this—my brother had an oral conversation with Mr. Hunt in which he approved those figures that you have submitted, and we simply haven't heard from Hunt—he is in the Army—but

(Testimony of Clarence E. Culver.)

my brother will testify that Mr. Hunt approved the amount that you gentlemen submitted, and we expect, of course, to get his written approval. Really, we had fifty formal approvals, and Hunt's, we are prepared to testify, is authentic in that he has approved it orally, and we have written him, and we offer these four files in evidence, that is, the forty-eighth letter and the forty-ninth letter, the fiftieth and the fifty-first, Mr. Macklin's.

Mr. Rockwood: We should point out that there are other papers in those files than the letters referred to.

Mr. George Mowry: Well, then I will just put the letters in. There's Warrick, Peddicord—Perry Hunt I think we have covered with a statement already. He hasn't yet got a formal letter in, but we are prepared to say that he is willing to accept that [46] settlement which you offered. That makes the fifty-first, Mr. Macklin.

(The three letters referred to, all dated March 27, 1946, signed Mowry & Mowry, addressed to Alfred F. Warrick, W. F. Peddicord and L. I. Macklin, so offered and received, were thereupon marked received, respectively, as Plaintiffs' Exhibits 3, 4 and 5.)

[“Exhibits 3, 4 and 5 are identical with Exhibit 1 except that they consist of letters to Alfred F. Warrick, W. F. Peddicord and L. I. Macklin.”]

The Court: I notice there is included in this exhibit number 2 a letter from Warriner, who I understand has been dismissed.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: That is true, your Honor.

The Court: And how about Fader?

Mr. George Mowry: Fader, his letter has been returned unclaimed and his case has been dismissed.

The Court: And how about Warriner?

Mr. George Mowry: The Warriner case has been dismissed, for the reason that he did not send back his withholding tax certificate.

The Court: All right.

Mr. George Mowry: We are perfectly willing, of course, to withdraw the Warriner letter.

The Court: No, it is in there; it won't hurt.

Mr. George Mowry: If your Honor please, I seem to have mislaid this Culver file. I have an exhibit in there that I [47] want to put into evidence. I suppose it is in this brief case. I have it.

Q. Now, Mr. Culver, after you quit this job, I believe you said February 27, 1945, what are the facts as to whether then you gave some thought to the matter of this thirty minutes that you had been putting in connection with this roll call?

A. I would say it was in May.

Q. I say, you gave some thought to it?

A. Yes.

Q. Now, without stating what is in any letter, what is the fact as to whether you wrote to anybody about that thirty minutes, to see whether you were entitled to compensation for it? A. Yes.

Q. And who did you write to?

A. To the Wage and Hour Office at Washington, D. C.

(Testimony of Clarence E. Culver.)

Q. At Washington, D. C.? A. Yes.

Q. And, without stating what you said in your letter or what their reply was, did you receive a reply to that letter? A. Yes.

Q. And do you still have that reply?

A. Yes.

Q. Now, you say you wrote the letter on what date? A. About March 20th. [48]

Q. May 20th? A. May 20th, yes.

Q. And this letter which you received in response, I will ask you what was done with that letter after you got it? What did you do with it? Did you turn it over to somebody? A. Yes.

Q. Who? A. Mr. Rawls.

Q. Mr. Rawls; he is one of the plaintiffs in this case? A. One of the guards, yes.

Q. Is he still employed at Swan Island?

A. Yes.

Q. And what is the fact, if you know, as to whether that letter was circulated, the letter and this reply which you got, were circulated among the men, the guards, at Swan Island?

A. Yes, it was.

Q. And copies were made of it?

A. Copies were made.

Q. And from the conversations that you had with your men and associates and the officials, what is the fact as to whether that letter which you received was brought to the attention of some of the officials of Kaiser Company, Inc.?

A. You mean how do I know it was brought to their attention?

(Testimony of Clarence E. Culver.)

Q. I say, is it a fact that it was brought to their attention? A. It was, yes. [49]

Q. And the Maritime Commission?

A. Yes.

Mr. George Mowry: Now—if you would like to see that letter—(handing same to Mr. Rockwood). Now, if your Honor please——

Mr. Rockwood: We have no objection. Of course, we are not bound by any statements which appear to be conclusions of law.

Mr. George Mowry: That is just what I was just going to say. I haven't even offered it, but, since they are willing to have it put in, I will put it in.

The Court: Admitted.

(Letter referred to, bearing date June 13, 1945, Charles H. Elrey, Branch Manager, U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, 208 U. S. Court House, Old, Portland 4, Oregon, to Mr. C. E. Culver, with encolsure, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 6.)

Q. (By Mr. George Mowry): Now, what is the fact as to whether you also wrote a letter in regard to this claim of yours to the United States Maritime Commission directly? A. Yes.

Q. And asking for payment?

A. Yes. [50]

Q. And did you receive a reply to that letter?

A. From the Kaiser attorneys.

(Testimony of Clarence E. Culver.)

Q. The reply came from the Kaiser Company, Inc.?

A. That is right.

Q. That was about September 7, 1946?

A. Yes.

Mr. George Mowry: '45—pardon me. Now, here is the rejection from the Kaiser Company. We offer that in evidence.

Mr. Rockwood: No objection.

Mr. George Mowry: I will ask you to show the letter to the witness, and will you ask him if that is the letter he received from the Kaiser Company?

A. Yes.

Q. I ask you, is that the letter you received from the Kaiser Company?

A. Yes.

The Court: Admitted.

(Said letter, bearing date September 7, 1945, Kaiser Company, Inc., Portland Yard, to C. E. Culver, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 7.)

Q. (By Mr. George Mowry): Now, Mr. Culver, the letter you received from the Kaiser Company is dated September 7, 1945. I will ask you if it is a fact that shortly after that you and some of the other guards conferred with my brother and myself, composing the firm of Mowry & Mowry? [51]

A. Yes.

Q. And I believe there was a retainer fee of \$250 paid to us, is that true?

A. Yes.

Q. And after we had looked into the law we and yourself and the other guards agreed upon a con-

(Testimony of Clarence E. Culver.)

tract upon which we would handle this case, is that true? A. Right.

Q. And this contract was signed by the guards involved, was it not? A. Yes.

Q. And you signed one of them? A. Yes.

Q. I will ask you if that is your signature and if you signed that contract? A. Yes.

Mr. George Mowry: We offer this contract in evidence.

Mr. Rockwood: May we see it, please, Mr. Mowry?

Mr. George Mowry: Yes.

Mr. Rockwood: I have no objection.

The Court: Admitted in evidence.

(Said communication, bearing date November 16, 1945, C. E. Culver to Mowry & Mowry, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 8.)

PLAINTIFFS' EXHIBIT No. 8

Portland, Ore., Nov. 16, 1945.

Mowry & Mowry,
Attorneys at Law,
1218 Failing Building,
Portland, Oregon.

Gentlemen:

I hereby employ you to institute and prosecute for me in the proper Court or Courts an action for wages due me from Kaiser Company, Inc., under

(Testimony of Clarence E. Culver.)

the provision of the Fair Labor Standards Act of 1938, I to receive in full the amount of all my unpaid minimum wages and unpaid overtime compensation recovered; and I hereby agree to pay you as your compensation in said matter all additional amounts recovered as liquidated damages and/or as attorney fees under the provisions of said act; I also authorize you to employ any attorney or attorneys you see fit to assist you in the said matter, said attorney or attorneys to be paid entirely out of your compensation as herein set forth.

/s/ C. E. CULVER,

Residence Address: 7824 S. E. Lambert,
Phone, if any.....

Received.

[Endorsed]: Filed April 23, 1946.

[“Exhibit 9 is identical with Exhibit 8 except that it relates to Len A. Maple.”]

Q. (By Mr. George Mowry): At the time you—well, I will ask you [52] this: You have already testified about signing the approval of the amount of \$428.42 less your deductions, for income tax and social security. A. Yes.

Q. I will ask you, now, are you individually satisfied and willing to accept the sum of \$428.42,

(Testimony of Clarence E. Culver.)

less the income tax and social security deductions, in full settlement of your claim against the defendant? A. Yes.

Mr. George Mowry: I think that is all the direct examination.

Mr. Rockwood: If your Honor please, I do not consider that this is a trial of this case on the merits, and, though there are some questions which I might ask this witness if it were a trial on the merits, under the circumstances I will have no cross-examination.

Mr. Hess: Well, there is one question that I would like to ask, your Honor, as *amicus curiae* here in this case.

Cross-Examination

By Mr. Hess:

Q. Do you understand in your settlement that you are settling your claim in full in this case based upon your claim for overtime as well as liquidated damages? A. Yes.

Q. You understand that? A. Yes.

Mr. Hess: That is all. [53]

The Court: Well, during all the time that you worked for Kaiser Company, then, they did hold a roll call at 11:30? A. Yes.

The Court: And you attended every time?

A. Yes.

The Court: And how long is that, now?

A. You mean how long did I work?

The Court: Yes, for what period of time was that?

(Testimony of Clarence E. Culver.)

A. From July, '43 until February, '45.

The Court: And on those occasions were others present at that roll call besides you?

A. Yes.

The Court: And that was always held at 11:30?

A. Or a few minutes after. Approximately.

The Court: Never held at 12:00 o'clock?

A. No.

The Court: All right.

Mr. George Mowry: Any further questions?

Mr. Rockwood: I have none.

Mr. George Mowry: I guess that is all, Mr. Culver.

(Witness excused.)

Mr. George Mowry: If your Honor please, we have, I think, some seventeen or eighteen other guards here, if you wish us to call them.

The Court: You had better call some of them.

Mr. George Mowry: All right.

The Court: I am interested in establishing the facts.

Mr. George Mowry: That is right.

The Court: Because, as I understand it, the Government of the United States has an interest in this money.

Mr. George Mowry: We will call Mr. Hursel E. Carr. [55]

HURSEL E. CARR

one of plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs herein, and was examined and testified as follows:

The Clerk: How do you spell your first name?

A. (Spelling) H-u-r-s-e-l.

The Clerk: (Spelling) H-u-r-s-e-l?

A. Yes, sir.

The Clerk: (Spelling) C-a-r-r?

A. Yes, sir.

(The witness was then duly sworn.)

The Clerk: Hursel E. Carr.

Direct Examination

By Mr. George Mowry:

Q. Mr. Carr, you live where?

A. At Multnomah, Oregon.

Q. And are you at present employed?

A. No.

Q. Now, were you employed as a guard at the Swan Island Shipyards of Kaiser Company, Inc.?

A. Yes.

Q. You had occasion to go over these figures submitted by the Kaiser Company, Inc., from their payrolls in regard to the dates that you went to work and quit and your respective rates of pay per hour?

A. I did. [56]

Q. All right. Now, those are correct, are they?

A. To the best of my belief, yes.

Q. And then I will ask you what you say as to

(Testimony of Hursel E. Carr.)

whether, to the best of your knowledge, you went to work, as disclosed by their records, on June 28, 1942, as a guard, at 87 cents an hour?

A. I did.

Q. And that on November 16, 1942, you were promoted to be a guard sergeant at a rate of \$1.25 an hour?

A. Yes.

Q. And on January 3d, 1943, you were a guard sergeant at the rate of \$1.10 an hour?

A. I believe that is correct.

Q. In May, 1943, you quit?

A. That is right.

Q. October 28th, 1943, you went back as a guard at 95 cents per hour?

A. Yes.

Q. December 27th, 1943, your pay as a guard was increased to \$1.05 an hour?

A. Yes.

Q. October 16, 1944, you became a senior guard at \$1.15 an hour?

A. I did.

Q. And on August 30, 1945, you were a guard at \$1.05 an hour?

A. That is right.

Q. And you were laid off on March 3d, 1946?

A. That is right.

Q. Now, I will ask you, what is the fact as to whether at all times you worked there as a guard—you worked, I believe, on all three shifts, did you not?

A. We had rotating shifts, yes, and at short period of time I worked on all three shifts.

Q. Now, I will ask you, what is the fact as to whether or not on any day or night that you worked you first appeared at a roll call?

A. Yes.

(Testimony of Hursel E. Carr.)

Q. And who had told you to appear at that roll call?

A. The chief of the guards, Captain Utley.

Q. And when did he give you that instruction?

A. Before I went to work.

Q. And was that instruction ever varied or modified in any way? A. No.

Q. And were the other guards present at the same roll call? A. Yes.

Q. And how long was that roll call before you relieved the guard that you succeeded?

A. Thirty minutes before.

Q. Thirty minutes; and what is the fact as to whether or not you have ever—well, I will ask you this: What is the fact as to whether, after roll call started, did you leave the [58] premises until your shift was over? A. No.

Q. And what is the fact as to whether you have ever received any pay for any portion of the first thirty minutes after the beginning of the roll call?

A. Never.

Q. Oh, yes—you have approved this settlement, which awards you \$550.05? I say, you have approved that, have you? A. I have approved—

Q. Do you know what the figure is?

A. Approximately five hundred and fifty.

Q. Yes, \$550.05. And are you willing and satisfied to take that amount in full settlement of your claim? A. I am.

Q. I think that is all—that is, that would cover your back wages, your overtime, any liquidated

(Testimony of Hursel E. Carr.)

damages, and attorney fees? A. That is right.

Q. If you get this \$550.05, less your income tax and social security deduction, is that right?

A. That is right.

Mr. George Mowry: You may cross examine.

Mr. Rockwood: No cross-examination.

Mr. George Mowry: All right, that is all.

(Witness excused.)

Mr. George Mowry: We will call Mr. Popma.

* * *

[“Thereupon plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg gave testimony substantially in accord with the testimony given by plaintiffs Culver and Carr.”]

Afternoon Session

Mr. George Mowry: If your Honor please, might we call Mr. Sidney Graham, out of order?

The Court: Yes.

Mr. George Mowry: Mr. Graham.

SIDNEY GRAHAM

was thereupon produced as a witness in behalf of the plaintiffs' herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. George Mowry:

Q. Your name is Sidney Graham?

A. Yes.

(Testimony of Sidney Graham.)

Q. And you are an attorney at law?

A. Yes.

Q. And are admitted to the Bar of the State of Oregon? A. Yes.

Q. When were you admitted?

A. June, 1911.

Q. And have you been engaged actively in the practice of law ever since? A. Yes.

Q. And, for the most part, practically all of the while in the City of Portland? A. Yes.

Q. Now you, of course, are a member of the Bar of this Court? [81] A. Yes.

Q. The United States District Court?

A. Yes.

Q. The United States Circuit Court of Appeals for the Ninth Circuit? A. Yes.

Q. And the Supreme Court of the United States? A. Yes.

Q. You have been acquainted with myself and my brother here for many years?

A. Yes, perhaps twenty-five years.

Q. Yes, maybe so; and, of course, you are acquainted with Mr. Hicks and Mr. Tongue, who are associated with us in this case? A. Yes.

Q. And I will ask you what is the fact as to whether you are familiar with their standing at the bar and their abilities? A. I am.

Q. Now, you have been furnished, I believe, with a copy of the stipulation which was introduced in this case as to attorney fees? A. I have.

Q. And you have read that over?

(Testimony of Sidney Graham.)

A. I have.

Q. Well, now, to put it briefly, it appears from that stipulation that this is a case where the plaintiffs, who were fifty-two in number until it was dismissed without prejudice as to two of them [82] a few days ago, so that there are now fifty in number, are suing for wages and overtime pay and liquidated damages under the Act known as the Fair Labor Standards Act of 1938, which is found in Title 29, United States Code Annotated—I believe it is Section 207. You are familiar with that Act? A. Yes.

Q. Now, it appears from the stipulation that the great majority of these plaintiffs contacted at least some of the present attorneys for the plaintiffs early last fall, no later than sometime in September, and two of the present attorneys, that is, myself and my brother, were paid a retainer fee at that time of \$250, and that we then negotiated with the resident attorney for the defendant, who, after taking the matter up with officials of the company, wrote us a letter in which he rejected the claim—and, incidentally, before we close the case I want to offer that letter in evidence. The matter was looked into at length by ourselves, making a study of the Fair Labor Standards Act and also of the Federal decisions, including decisions of the Supreme Court of the United States cited under that Act, and the United States Code Annotated, and when the claim was rejected, after we had had these questions of law up with the resident attorneys, my

(Testimony of Sidney Graham.)

brother and I consulted Mr. Tongue and Mr. Hicks with the idea of getting them to come into the case with us, which they did, and, therefore, since early last fall there have been four attorneys for these various claimants. The [83] stipulation shows that the complaint was filed on the 7th day of December, 1945. At that time there were thirty-four plaintiffs in the complaint. Within a short time, however, eighteen more plaintiffs were added by way of a supplemental complaint, which was filed on the 30th day of January, 1946, which made a total of fifty-two plaintiffs. Conferences between the attorneys for the plaintiffs and the attorneys for the defendant began early in January. I think there was one prolonged conference on the 4th day of January here in this city between those attorneys and some of the attorneys, at least, for the plaintiffs. From then on there were numerous conferences, and, finally, while these negotiations were going on, the defendant filed its answer; I think the date of filing the answer was February 18, 1946. That answer consists of a general denial, which placed in issue all of the allegations of the complaint. Incidentally, by the time the supplemental complaint was filed the pleadings on the plaintiffs' side amounted to something like thirty-four or thirty-five pages, and those allegations were placed in issue by this denial. Now, since then the negotiations have been carried on with the attorneys for the defendant to a very considerable extent. Mr. Johnson, one of the attorneys for the Kaiser

(Testimony of Sidney Graham.)

Company, resides in San Francisco. He has been up here numerous times, conferring with the attorneys for the plaintiffs in respect to the proposed settlement of this case. Now, it appears from the stipulation [84] the parties finally did agree upon the terms of a settlement. The action in its final form was to recover approximately \$17,500 for these fifty-two men and a like amount in liquidated damages and a reasonable attorneys' fee. The settlement which was finally agreed upon provides that the men are to receive the full amount they have prayed for, in the first instance, that is, the full amount of approximately \$17,500, and that an attorney fee is to be fixed by the Court. The record here shows that in entering into their contracts with ourselves the men agreed that we should have the liquidated damages in the event of a recovery, that they were to get the full amount of their original claim and that we would have the liquidated damages. Now, by the terms of this stipulation, we have agreed, as attorneys for the plaintiffs, all four of us have agreed to accept a certain amount as an attorneys' fee and that the men shall have the \$17,500, approximately, and that that is all that will be paid by the Kaiser Company; that's the terms of the agreement, and it is, I think, all covered in this stipulation which you have.

Now, I will ask you, Mr. Graham, what is the fact as to whether or not, in your many years of practice, you have personally handled numerous

(Testimony of Sidney Graham.)

cases that involve amounts ranging from fifteen to twenty thousand to twenty-five thousand dollars, thirty thousand dollars, and upwards?

A. I have. [85]

Mr. Rockwood: Just a minute. I have no objection to the question. I want to make a slight correction in the statement that you made as to what our stipulation was.

Mr. George Mowry: Yes.

Mr. Rockwood: We stipulated to the entry of a judgment for this amount of seventeen-odd thousand and attorneys' fees in the sum of \$3500. We did not stipulate in terms to pay attorneys' fees as might be fixed by the Court. You indicated that in your question.

Mr. George Mowry: That is a fair statement.

Mr. Rockwood: That is right. We stipulated to the entry of judgment for \$3500 attorneys' fees.

Mr. George Mowry: That is absolutely true. There is no question about that. I think that is in the stipulation that Mr. Graham has read, but, whether or not that is the fact, Mr. Graham, now I will ask you whether or not it is a fact as to whether or not in your practice you also have personally charged and collected fees for legal services ranging from three to four to five thousand dollars and upwards? A. I have.

Q. Now, it is also stipulated that these negotiations with the attorneys for the defendant also resulted in conferences, and numerous conferences, between at least some of the attorneys for the fifty-

(Testimony of Sidney Graham.)

two plaintiffs, and of a very great number of the fifty-two plaintiffs there were conferences that were occurring [86] either in person or by telephone practically all the time for a period of the last six or seven months.

Now, taking into consideration the facts set forth in the stipulation and the character and extent of the services that have been performed and the novelty and, you might say, doubtfulness of the questions involved under an act which was not enacted until 1938 and under which, so far as I know, there has been no decision by the Supreme Court of the United States pertaining to guards such as these men were, guards at a shipyard, and taking into consideration the time that was necessarily spent in the handling of this case in behalf of the plaintiffs, taking into consideration the experience and standing of the attorneys for the plaintiffs and the ability of the attorneys for the defendant, taking into consideration the amount involved and the importance of the cause and the responsibility assumed by the attorneys for the plaintiffs, taking further into consideration that this case was taken by the plaintiffs' attorneys, except for this small retainer fee of \$250, upon a contingent basis, so that if no recovery were had there would be nothing to pay any attorneys' fee at all outside of the \$250 which has been already paid, taking into consideration the results attained by the plaintiffs' attorneys in bringing about this proposed settlement, which has been approved by the Maritime Commission and

(Testimony of Sidney Graham.)

by the Department of Justice, and also taking into consideration the amounts usually charged or awarded for similar services [87] of a similar character—and, by the way, you are familiar with the amounts charged and paid in this locality for such services, are you not? A. I think I am.

Q. All right, taking all of those things into consideration, what would you say would be a reasonable attorneys' fee to be allowed to the plaintiffs in this case?

A. In my opinion, a minimum reasonable fee would be one-fourth of the recovery, or the sum of approximately \$4300.

Mr. George Mowry: You may cross-examine.

Mr. Rockwood: I have no cross-examination.

The Court: Mr. Hess?

Mr. Hess: No cross-examination, your Honor.

Mr. George Mowry: Thank you, Mr. Graham.

The Witness: May I be excused?

The Court: Yes, surely. Thank you for appearing.

(Witness excused.)

Mr. George Mowry: We will call Mr. Hanson.

* * *

The Court: Now, will you represent to the Court, Mr. Mowry, that the rest of these plaintiffs will all give similar testimony regarding the existence of the roll call?

Mr. George Mowry: The rest of those who are in Court will [101] give similar testimony. We

were able to locate eighteen of them today. The others——

The Court: Will you read the names into the record that you have in attendance?

Mr. George Mowry: Mr. M. M. Long is here, or should be. He has a claim of \$241.22.

Mr. George W. Hess is here. He has a claim of \$223.73.

Mr. George F. Nickels is here, with a claim of \$130.64.

Mr. W. C. Griffin, with a claim of \$142.24.

Mr. Arthur E. Johnson is here with a claim of \$305.54.

Mr. E. R. Johnson is here, or should be, with a claim of \$455.60.

Mr. John C. Cronin is here, with a claim of \$531.02.

Mr. John VanHook is here, with a claim of \$426.66.

I think that concludes them.

Mr. Hess: May I——

The Court: These witnesses, as I understand, you now represent to the Court, would testify that there was a roll call taken substantially each time, where they went on shift, substantially thirty minutes before the time, and that they remained on the premises until after the shift ended?

Mr. George Mowry: That is right, and up until March 1st, 1945.

Mr. Hess: If your Honor please, may I just ask Mr. Mowry if he would include in the record there that these witnesses would testify as the last ones

that have already taken the stand [102] that they understand that this is in full settlement not only of their wages with overtime, but liquidated damages and attorneys' fees?

Mr. George Mowry: Oh, yes, that is understood, subject to such attorneys' fees as the Court might allow.

Mr. Hess: Yes, I understand, but it includes all of those elements, liquidated damages and overtime?

Mr. George Mowry: Yes, it does.

Mr. Hess: As these others have testified?

Mr. George Mowry: They would so testify.

The Court: Now, is there any question, Mr. Rockwood, as to whether the Kaiser Company, Inc., is engaged in the production of goods for commerce and falls within the terms of the Fair Labor Standards Act?

Mr. Rockwood: There is in the instance of some guards. Some of these guards, if your Honor please, were working in barracks areas, dormitory areas, cafeteria areas, outside the fence. There is a dispute between the parties as to whether guards in such positions, on such posts, were engaged in commerce or the production of goods in interstate commerce. There is a dispute of law **there**.

The Court: And, in that regard, this settlement which is made in gross is for the purpose of covering those contingencies as well as the question as to the time?

Mr. Rockwood: Yes, sir. As I understand the facts, the [103] individual guards, with few excep-

tions, were on various posts throughout this period, and a guard one day might be working inside the fence, along the ways, we will say. Another day that same guard might be working over in Mock's bottom near the parking lot, outside the fence, and another day he might be working from some other post. Yes, that question of law will be disposed of by the settlement, as well as the disputed questions of fact.

The Court: There is no question about the main proposition that Kaiser Company, Inc., is itself in a business which would fall under the terms of the Fair Labor Standards Act?

Mr. Rockwood: That is correct. That is, their operation as a shipbuilding plant at Swan Island.

The Court: Yes. Have you anything to add for the record, Mr. Hess?

Mr. Hess: Yes, your Honor, I have. As far as an action under the Fair Labor Standards Act and against a Government cost-plus contractor, it is the duty of the United States Attorney to act in a supervisory capacity only of a cost-plus contractor. As United States Attorney I am not appearing on behalf of either party litigant, but only as *amicus curiae* in an advisory capacity to this Court. The United States Attorney's office has previously elected that the defense or settlement of this case be handled by private counsel for the defendant contractor, namely, Kaiser Company, Inc. The pleadings in this case and other papers have [104] been submitted by the United States Attorney's office to the Attorney General's office and the mat-

ter has been considered by the Maritime Commission, contracting agency on behalf of the Government. The Department of Justice has informed a dispute between the parties as to whether guards me that the Maritime Commission has indicated that the proposed settlement in full for overtime and liquidated damages in the sum of \$17,352.08, and plus attorneys' fees in the amount of \$3500, was satisfactory to the Maritime Commission. The case involves fifty-two plaintiffs, and since the indicated settlement and the indicated approval by the Maritime Commission, as the records will show, the case has been dismissed without prejudice as to two of these plaintiffs, and, therefore, the judgment should be reduced accordingly.

I might add here that all decisions as to whether claims against the cost-plus contractors are reimbursable by the United States, whether those claims are in the amount involved in the lawsuit or the amount claimed as counsel thinks, are questions to be decided by the contracting agency; that is, in this case, the Maritime Commission. The Department of Justice has no responsibility in connection with such decisions. Therefore, any supervision undertaken by the United States Attorney's office or any settlement made in this case is without any prejudice to any right that the Government may have relative to any claim that might be presented by the contractor against the United States through its contracting agency or otherwise [105] as a result of settlement and judgment order based thereon.

I might state here that counsel for both the plain-

tiffs and defendant have been very cooperative in furnishing material as requested by the United States Attorney's office in this case. However, I did not receive until just this afternoon in the mail the copies of this stipulation relative to what the attorneys for the plaintiffs would testify as to reasonable attorneys' fees, and I note a statement in here to the effect—it is in paragraph numbered 11, on page 3—"That plaintiffs' attorneys were successful in consummating a settlement of the action under which plaintiffs are to receive payments in the amount of \$17,352.08, which said settlement has been approved by the United States Attorney and the United States Maritime Commission."

We realize that this is a judgment against Kaiser Company in its corporate capacity, and that if Kaiser Company has any rights against the Maritime Commission under its contracts they will be seasonably presented, but this proceeding will not dispose of that question.

The Court: There is one thing, Mr. Mowry, you did not exactly cover all of the plaintiffs in this case. In your statement you covered those who were in the court room. I think we should have some statement from you that similar testimony would be presented for all the plaintiffs.

Mr. George Mowry: Well, I am sure it would, your Honor. [106] I can say that. We have fifty who have approved those respective amounts in writing and those papers are in the court.

The Court: Well, I just wanted to know.

Mr. George Mowry: Yes, your Honor.

The Court: You have stipulated that the testimony would be the same as to those who have already testified?

Mr. George Mowry: Yes, we do, your Honor.

The Court: Now, one thing more: I am going to ask you as an attorney, are you actually charging the amount that is being allowed?

Mr. George Mowry: Are we charging——

The Court: Yes, are you going to collect the money?

Mr. George Mowry: Oh, yes, there is no doubt about that.

The Court: This allowance of attorneys' fees, from the angle of the Court, the Court will not permit attorney fees to be recovered by the plaintiffs in any case in which the attorney does not receive them.

Mr. Rockwood: If your Honor please, the attorneys' fees in the amount that we have stipulated, if approved by your Honor, will be paid by us to the plaintiffs' counsel, by the Kaiser Company, by draft payable to counsel. It will not be paid to the involved plaintiffs. The amounts necessary to satisfy the individual judgments obtained by each one of these plaintiffs will be paid off by draft to each individual plaintiff [107] and we will take his receipt in satisfaction of the judgment from each individual plaintiff, after making the necessary deduction for social security and withholding tax.

The Court: The Court is only, in this respect, satisfying the rule of this Court. The Court does

not permit a party to recover attorney fees which he does not pay to the attorney.

Mr. Rockwood: The amount will be paid to the attorneys, yes, sir.

The Court: Are there any other matters, then, or are you willing to submit this now on the record as made?

Mr. George Mowry: As we said a while ago, we thought we would like to put in that letter rejecting the claim.

The Court: Yes.

Mr. George Mowry: We offer in evidence this letter from Mr. Whitaker rejecting the claim.

Mr. Rockwood: No objection.

The Court: Admitted.

(Letter bearing date October 9, 1945, Frank L. Whitaker, Resident Attorney, Kaiser Company, Inc., to Mowry and Mowry, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 10.)

Mr. George Mowry: The suggestion has been made that the letter from the Maritime Commission has not been received in evidence, and I wondered if your Honor thought that should be in?

Mr. Tongue: We do not insist on it, your Honor, unless the Court feel it advisable that we have it as part of the record.

The Court: Where is it?

Mr. Rockwood: I have it here. I am sure I have it here. At the moment all I can put my hand on is a photostat copy of the letter and a photostat

copy of the telegram. Somewhere in my papers I have the original.

The Court: Won't that be sufficient?

Mr. Tongue: That will be satisfactory.

Mr. Rockwood: Then I will offer in evidence a photostat copy of a letter from the United States Maritime Commission, by Mr. Wade H. Skinner, General Counsel, March 29, 1946, addressed to the firm of Thelen, Marrin, Johnson & Bridges, San Francisco, to the attention of Mr. Gordon Johnson.

(The photostatic copy of letter referred to, so offered, was thereupon marked received as Defendant's Exhibit 11.)

DEFENDANT'S EXHIBIT No. 11

United States Maritime Commission
Washington 25, D. C.

March 29, 1946

Thelen, Marrin, Johnson & Bridges
111 Sutter Street
San Francisco, California.

Attention: Gordon Johnson, Esq.

Subject: Macklin et al. v. Kaiser Company,
Inc.

Gentlemen:

Confirming our telegram to Mr. Johnson of March 26, 1946, this will advise you that the Maritime Commission on that date approved the pro-

posed settlement of above case by entry of judgment in the sum of \$17,352.08 agreed to be owing to the plaintiffs as overtime compensation under the Fair Labor Standards Act. The Commission also approved payment in this case of plaintiffs' attorneys' fees of \$3,500.00.

The Commission simultaneously authorized settlement on the same basis of other suits that may be brought by plant guards involving substantially similar fact situations, with plaintiffs' attorneys' fees agreed on by the parties as follows: From \$17,500 to \$40,000, 7% or \$1575; from \$40,000 to \$60,000, 5% or \$1,000; from \$60,000 to \$80,000, 4% or \$800; from \$80,000 to \$100,000, 2½% or \$500; over \$100,000, 1%.

Kindly advise this office of the disposition of the case, and favor us with a copy of the judgment entered therein.

Very truly yours,

/s/ WADE H. SKINNER,
General Counsel.

Received.

[Endorsed]: Filed April 23, 1946.

Mr. Rockwood: I also offer in evidence photostat copy of a telegram from Paul D. Page, Jr., of the United States Maritime Commission, whom I personally know to be the Solicitor of the Maritime Commission—Paul D. Page, Jr., to Mr. Johnson at the Multnomah Hotel, Portland.

The Court: Received in evidence.

(Said photostat copy of telegram, bearing date March 26, 1946, Paul D. Page, Jr., to Gordon Johnson, so [109] offered and received, was thereupon marked received as Defendant's Exhibit 12.)

DEFENDANTS' EXHIBIT No. 12

[Telegram]

Portland, Oregon, 1946 Mar 26 PM 5

PRAS54 20/19 Govt 2 Extra PD Portland Org
26 430P

Gordon Johnson

Multnomah Hotel Ptld

Re Macklin Versus Kaiser Company. Commission
Today Approved Entry of Judgment \$17,352.08 and
Attorneys' Fees of \$3,500.

PAUL D. PAGE, JR.,

U. S. Mar Comm, Wash DC.

\$17,352.08 \$3,500.

Received.

[Endorsed]: Filed April 23, 1946.

Mr. Rockwood: I have the originals here. I have just found them among my papers.

The Court: If there is no objection, we will just leave these——

Mr. George Mowry: No objection.

The Court: Anything further?

Mr. Rockwood: I have nothing further.

The Court: The Court directs that a transcript in this case will be filed at the cost of the parties, and the Court will take the matter under advisement, this being a case of novel impression, and the Court wishes to be sure that the procedure is correct. In future cases I may follow a modified procedure to what has been adopted in this case. In this case I have been proceeding more or less by rule of thumb. As soon as the transcript is out I will write a short opinion, in which I will cover the situation and make the determination at that time approving settlement.

Is there anything further?

Mr. Rockwood: Mr. Johnson suggestions that we stipulate that the amount of costs may be included in the judgment, and we are willing, with your Honor's permission, for it providing that the cost of the transcript shall be paid for by the defendant, without a change in the stipulation relating to the costs and judgment. [110]

The Court: Yes.

Mr. George Mowry: I would like to say one thing, your Honor——

The Court: Yes.

Mr. George Mowry: ——and that is, of course, it goes without saying that this contract with ourselves, whereby we were to get the liquidated damages will be purely thrown aside by the award of any attorneys' fees that your Honor sees fit to award. In other words, the only attorney fee we

are getting will be what your Honor awards, other than the \$250 that we have already received.

The Court: Yes, that is what I had assumed.

Mr. George Mowry: Yes, your Honor.

The Court: No further matters? Court will be in adjournment until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:05 o'clock p.m., Tuesday, April 23, 1946, proceedings in the above-entitled cause were concluded.) [111]

Reporter's Certificate

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, hereby certify that I reported in shorthand proceedings had at the trial of the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of one hundred eleven pages, numbered 1 to 111, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand, and the whole thereof.

Dated this 9th day of May, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed May 9, 1946 U.S.D.C.

[Endorsed]: Filed Oct. 16, 1950 U.S.C.A.

In the District Court of the United States
for the District of Oregon

No. Civ. 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

Before: Honorable James Alger Fee,
Judge.

Appearances:

THOMAS H. TONGUE III,
Of Attorneys for Plaintiffs;

HART, SPENCER, McCULLOCH &
ROCKWOOD, by

FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

HENRY L. HESS,
United States Attorney.

TRANSCRIPT OF ORAL OPINION

The Court: I have asked the attorneys in the case of L. I. Macklin vs. Kaiser Company, Inc., to be present in court. I have a short memorandum upon that matter, which I will simply announce here.

This is an action under the Fair Labor Standards

Act to recover for overtime, liquidated damages and attorneys' fees for fifty-two plaintiffs who acted as guards for Kaiser Company, Inc., in its Portland shipyards. There has been a stipulation entered into by the parties and approved by the Maritime Commission as to the amount to be paid each plaintiff and the attorneys. This is not, however, payment in full of the amount claimed by each together with the liquidated damages approved by the statute. There is another dispute, also, which is shown by the record, which is also compromised. The Court at page 103 of the record, says as follows:

“Now, is there any question, Mr. Rockwood, as to whether the Kaiser Company, Inc., is engaged in the production of goods for commerce and falls within the terms of the Fair Labor Standards Act?”

“Mr. Rockwood: There is in the instance of some guards. Some of these guards, if your Honor please, were working in barracks areas, dormitory areas, cafeteria areas, outside the fence. There is a dispute between the parties as to whether guards in such positions, on such posts, were engaged in commerce or the production of goods in interstate commerce. There is a dispute of law there.

“The Court: And, in that regard, this settlement which is made in gross is for the purpose of covering those contingencies as well as the question as to the time?”

“Mr. Rockwood: Yes, sir. As I understand the facts, the individual guards, with few exceptions, were on various posts throughout this period, and

a guard one day might be working inside the fence, along the ways, we will say. Another day that same guard might be working over in Mock's Bottom near the parking lot, outside the fence, and another day he might be working from some other post. Yes, that question of law will be disposed of by the settlement, as well as the disputed questions of fact.

"The Court: There is no question about the main proposition that Kaiser Company, Inc., is itself in a position which would fall under the terms of the Fair Labor Standards Act?

"Mr. Rockwood: That is correct. That is, their operation as a shipbuilding plant at Swan Island."

In view of the claim which will ultimately be for consideration of such matters in determining the liability of the United States to Kaiser Company, Inc., in relation to its construction of certain ships, this whole matter is of public interest. The Court, therefore, ordered that there be a trial to determine whether the stipulation should be approved. Testimony was taken and the matter was thoroughly reviewed. The transaction was fair and regular and an appropriate settlement was arrived at which the Court would approve without question if it were not for certain factors which now require further examination in view of recent developments. Since the Court took this matter under advisement the Supreme Court of the United States has handed down an opinion in the case of *D. A. Schulce, Inc., Petitioner, vs. Salvatore Gangi*, suing on behalf of himself and other employees similarly situated. This opinion was announced by Mr. Justice Reed on

April 29, 1946. The Court will not review the case, except simply to call it to your attention and to direct attention to a paragraph or so.

“In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction. Instead Congress adopted a mandatory requirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.

“It is realized that this conclusion puts the employer and his employees to an ‘all or nothing gamble,’ as Judge Chase phrased the result in his dissent below. Theoretically this means each party gets his just desserts, no more, no less. The alternative is to find in the Act an intention of Congress to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees’ chosen representatives, bargaining agent or some other. We think the purpose of the Act, which we repeat from the O’Neil case was to secure for the lowest

paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage."

Now, to that there is a very cryptic note, which I do not pretend to understand, part of which read:

"Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by Petitioner. *North Shore Corporation vs. Barnett, et al.*, 323 U. S. 679.

"Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amount actually due stand in no better position than bona fide settlements."

There is more to the note which I will not read.

The opinion seems to hold that the full sum is due by law to each of the plaintiffs and that there can be no compromise. The Court desires to be advised whether it is believed that the Court is empowered to abstract money from plaintiffs even though they agree thereto in court. Furthermore, since coverage cannot be compromised, the Court doubts its power, in view of this opinion, to enter a judgment which gives to certain plaintiffs less than they alone would be entitled to, because of the inclusion in the settlement of certain other employees who might not be covered at all.

Now, I will set this down for argument or deal with it in any way that the parties may desire.

Mr. Rockwood: Does your Honor wish to have

briefs filed on the question of the legality of the settlement?

The Court: Well, if that is an agreeable method with the attorneys to deal with the question I will be glad to, and if I am not fully advised I will order oral argument.

Mr. Tongue: That will be entirely satisfactory to the plaintiffs, your Honor.

The Court: How much time do you want?

Mr. Rockwood: Well, I assume that my associates will be primarily responsible for the writing of the brief and I would like thirty days.

Mr. Tongue: That is agreeable, your Honor.

The Court: And how much time would you wish?

Mr. Rockwood: Well, I think, since this is not really controversial,—I don't think it is a question of sustaining the burden of the settlement any more than the plaintiffs sustain the burden of the settlement; we are both on the same side, we both want to settle—I think we can file them simultaneously.

Mr. Tongue: Yes.

The Court: Yes, not only that, but the Court would like to have you settle.

Mr. Rockwood: May I request permission to secure from the reporter a transcript of your remarks this morning, your Honor.

The Court: Yes. Thirty days allowed altogether to anyone who wants to file a brief, and if at that time the Court is not fully advised I will order oral argument.

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, hereby certify that on Monday, the 13th day of May, 1946, I reported in shorthand oral opinion by the Court and accompanying colloquy between the Court and counsel had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript consisting of seven pages, numbered 1 to 7, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 14th day of May, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed May 20, 1946.

In the District Court of the United States
for the District of Oregon

No. Civil 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

James Alger Fee, District Judge.

December 20, 1946

OPINION

The initiation of the present litigation came about through one Clarence Culver, a former resident of Oklahoma. He came to this section, according to his testimony, at the request of the Kaisers who were soliciting help. At first employed at Oregon Shipbuilding Corporation and later as a guard at Swan Island Shipyard on July 24, 1943, he drew 95 cents an hour until October 3, 1943, when he was employed at \$1.05 per hour until his release on February 27, 1945. He claims he was required to report at roll call from eight to thirty minutes ahead of midnight when he went on duty and watched until 8:00 a.m. For some unaccountable reason, it was some months after his release while he was in other employment, that he first gave thought to the fact that he had been putting in overtime in connection with the roll call. As a result he wrote to the Wage

and Hour Office at Washington, D. C. The Wage and Hour Office in Portland advised Culver, who is one of the plaintiffs here, regretfully, that they were unable to prosecute for the recovery of overtime and suggested that he take measures to bring suit himself. They did not advise him that there was any doubt as to his right to collect in view of the fact that any liability might ultimately fall upon the United States Government for whom the employees of this bureau were working. Judge Dawkins in an opinion marked with crisp perspicacity says in *Love vs. Silas Mason Co.*, 66 F. Supp. 753, where he discusses the effect of a contract between the United States Government and the employer for the prosecution of the war effort:

“This contract with the Government was entered into for performance in this state for the producing of munitions needed to prosecute the recent war and any judgment recovered will have to be paid, not by defendant, but by the Government.

“According to the contention of defendant in this case all these employees, who have sued for several hundred thousand dollars, continued to work without complaint under the assumption by all parties that they were not affected by the Fair Labor Standards Act.”

This action was begun under these auspices by fifty-guards of the war-time operated shipyards of Kaiser Company Incorporated to recover overtime, penalties and attorney fees under the Fair Labor Standards Act of 1938. The action is founded on the

claim that each of these guards was required to report one half hour before being posted as a watch, for roll call. Whether the intention before filing suit was to dispose of this cause by settlement or otherwise, the parties have now stipulated that the defendant company should pay less than the amount claimed for overtime, make no payment on penalties and pay a sum as attorney fees in full settlement of all liability. The United States Maritime Commission has approved the agreement by a letter in writing.

Thereafter, motion was filed for this court to enter judgment in strict accordance with the stipulation. The court did not enter the judgment. Instead, the taking of testimony was ordered. Evidence indicating the attorney fees demanded were reasonable if the order entered, was then offered. Only upon the insistence of the court was any testimony offered as to the facts. There was no cross-examination since one of the attorneys for defendant frankly stated that if this were a trial on the merits he would have asked questions, but since he did not consider the proceeding of that nature he would not cross-examine. The United States did not intervene, nor was there any appearance in its behalf. The court directed the United States Attorney to appear *amicus curiae*. The testimony of nine only of the fifty-one plaintiffs tended to show that a roll call was once established at thirty minutes before the time of going on duty. Another witness indicated that this degenerated and eventually guards even reported late without penalty. Due to the suggestion

of the court, there were other plaintiffs in the courtroom and it was stated without objection that their testimony would be the same as the other plaintiffs and this was stated also as to the balance of the fifty-one plaintiffs who neither testified nor were in the courtroom.

After the testimony was finished the court raised the question as to whether Kaiser Company Incorporated was engaged in the production of goods for commerce in building these ships. One of the attorneys stated, without contradiction, that the Kaiser Company Incorporated was so engaged. The court also raised the question as to whether the plaintiffs were so engaged. In reply it was stated that in the case of some guards there was a dispute as to this feature since they had worked in barracks areas, dormitory areas, and cafeteria areas outside the fence, but that the settlement was in gross and covered these employees also.

The court at the outset was inclined to enter judgment on a stipulation between private parties but was of opinion, since there was a public interest, testimony was required. On an independent search conducted in view of the fact that all concerned were acquiescing in the entry of judgment, the court discovered serious obstacles. Therefore, the court raised the question as to whether the inclusion of overtime for employees who worked in positions where they were thus guarding installations which had no relation to the production of goods for commerce, was not a compromise of coverage whereby the overtime worked by employees who might have

been engaged in the production of goods for commerce was balanced off against the time of those who clearly were not so engaged, and a compromise thus effected which did not do justice to the inalienable rights of the former. In view of the factual situation thus existing and in view of the failure to pay anything on account of the liquidated damages provided for by the Act, the court pointed out that it was probably that plaintiffs could not accept a compromise of their respective claims assuming these were valid. The court made this inquiry in the light of the opinion in *D. A. Schulte, Inc. vs. Gangi*, 90 L. Ed. (Advance Opinion) 873.

Briefs were filed upon the legality of the settlement in the light of these propositions. It was argued by both plaintiffs and defendant that it is permissible for employees to settle where there is a dispute as to the amount of overtime worked as distinguished from coverage. Explaining away a rather fulsome statement above noted indicating some employees had not worked all the time guarding installations used for the production of goods for commerce, defendant now says an investigation has been made which discloses that no employees worked a complete week around that type of installation. Further, it says "it must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are

no facts with respect to the plaintiffs here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, * * *." Defendant, therefore, offers to include these propositions in a stipulation.

The court is still impressed with the position that even in private litigation the plaintiffs, or others in their situation, would not be permitted simply to enter a compromise judgment upon a stipulation which did not set up facts showing their coverage. This stipulation is devoid of any agreement as to such facts. Although there is loose expression in some opinions, no law requires a court to perform the judicial act of entering judgment simply because the parties have agreed that a certain figure shall be used as the amount of damage or liability. The court has jurisdiction to dismiss the action even though the reasons for so doing may be utterly inadequate.¹ Likewise, the court has jurisdiction to refuse to enter judgment upon a stipulation which does not set out facts. The court might well conclude this case upon the proposition that the plaintiffs have no right to bargain away the benefits conferred by the Act in question. A court can "always refuse to sanction such agreements, when right and justice so require." *McLeod v. Hyman*, 272 Pennsylvania 582 [116 Atlantic 535, 536].

But the court has made an independent investigation and is of the opinion that judgment cannot be entered on this stipulation in any event. An exam-

¹*Haggard vs. Pelicier Freres* [1892] A.C. 61.

ination into the pleadings, the stipulation itself, and the statements made by the respective attorneys in court makes crystal clear the proposition that any judgment entered in this case based on the stipulation would determine questions of fact which are highly controversial and establish as principles of law theories highly debatable. These may be outlined as follows: (a) there is a question as to whether the Kaiser Company Incorporated was engaged in the production of goods for commerce; (b) there is a question of whether these individual men were engaged in the production of goods for commerce either directly or indirectly even when they were guarding the main installations of the shipyard; (c) there is a question whether all of these men were engaged at all times in the production of goods for commerce when they were guarding other installations only indirectly connected with the construction; (d) there is a question of whether plaintiffs should be entitled to compromise their individual claims whether effecting coverage or not; (e) there is a question of whether the Kaiser Company Incorporated, while it was engaged in the production of ships for the war effort under a cost contract plus fees in production of goods for the United States came within the purview of the Fair Labor Standards Act; (f) there is a question of whether the Maritime Commission as an administrative body can adjudicate these rights and agree to pay the same and have a judicial decree entered enforcing their determination; (g) there is a question of whether the United States can be rendered liable by

stipulation, judgment or otherwise for overtime pay under the Fair Labor Standards Act; (h) there is a question of whether the United States can be rendered liable either by stipulation or judgment for a penalty imposed on private employers for failure to obey the mandates of the Fair Labor Standards Act of 1938.

It is clear from a review of the course of the proceedings that facts are here impliedly agreed to by the respective parties which may be contrary to those which a court might find upon a trial where the issues were sharply contended. The defendant is willing to stipulate further facts based on its investigation which a cross-examiner might destroy. There, parties by stipulating for a judgment have assumed certain rules of law. They even impliedly agree to doctrines of constitutional law on which the jurisdiction of the court is founded.

But a court examining such questions may properly, and at times is duty bound to, find the "fact" set up in a stipulation to be untrue.² No validity is allowed by courts to an agreement between parties litigant as to the rule of law.³ Force in geometrical proportion emanates from these propositions where precedent making construction of the Constitution is required, or where the jurisdiction of the court is involved. Consent of the parties can establish

²*Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289.

³92 A.L.R. 664, 665; *United States v. Johnson*, 319 U. S. 302, 304.

neither the one or the other. The question whether either a contractor on a cost contract plus fees with the United States in building ships for the war effort, or his employees, is engaged in producing goods for commerce must be answered affirmatively by the court before it passes judgment. Jurisdiction of the court is inherent in that affirmative finding.

This issue should never be determined by a court in a proceeding which is not adversary. A tenant of residential property owned by defendant brought suit alleging that the property was in a defense rental area for which the Price Administration had promulgated a regulation and that the rent paid by him was in excess of the maximum fixed by the regulation. The court held that the action should be dismissed because the regulation was unconstitutional since Congress had improperly delegated power to the Administration. It appeared that the defendant owner had undertaken to procure an attorney to represent plaintiff and had assured plaintiff that his presence in court would not be necessary. The court said:

“The Government does not contend that, as a result of this cooperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the

constitutional validity of legislative action.”

United States vs. Johnson, 319 U. S. 302, 304.

Especially must it be noted that this suit is not adversary. When questions such as are posed by this record arise, the courts will be extremely hesitant to dispose thereof when the proceedings are not clearly adversary even if in entire good faith.⁴ Indeed, it is expressly said that “such a suit is collusive because it is not in any real sense adversary.”⁵ This action is frankly and avowedly friendly. It was expressly stated in the record, “we are both on the same side.” It may be noted without obloquy that counsel are able to agree on any proposition of fact or law necessary to base the judgment.

As a result of this absence of controversy, the stipulation of settlement renders the case moot.⁶ The court is not then bound to enter judgment to enforce the stipulation of settlement made by the parties.^{6a} It is hornbook law that whenever a case in a federal court is settled by agreement, no “case

⁴Coffman v. Breeze Corporations, 323 U. S. 316, 324-5; Congress of Industrial Organizations v. McAdory, 325 U. S. 472, 475.

⁵United States v. Johnson, 319 U. S. 302, 304.

⁶Paradise Land & Livestock Co. v. Federal Land Bank of Berkeley, 10 Cir., 147 F.2d 594; Buck's Stove & Range Co. v. American Federation of Labor, 219 U. S. 581; Dakota County v. Glidden, 113 U. S. 222, 223-4.

^{6a}Hartford v. Bridgeport Trust Co., 143 F. 558.

or controversy”⁷ remains and therefore the court loses jurisdiction.⁸ A court of the United States by this constitutional limitation lacks power to render opinions merely advisory,⁹ or to decide moot questions,¹⁰ or to set precedents for future litigation.¹¹ When, by action of the parties, a case becomes moribund neither their desire nor their express consent can retain life in the controversy.¹²

But it is intimated in the record that the Attorney General has consented to the entry of judgment. In a case where the Government had confessed error in the trial of a criminal case, the court refused to be bound thereby saying:

“The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing

⁷U. S. Constitution, Art. III.

⁸*St. Pierre v. United States*, 319 U. S. 41, 42.

⁹*United States and Interstate Commerce Commission v. Alaska Steamship Company, et al.*, 253 U. S. 113, 115.

¹⁰*United States of America v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475-77.

¹¹*California v. San Pablo and Tulare R.R. Co.*, 149 U. S. 308, 313-14 and cases cited.

¹²*Southern Pacific Co. v. Eshelmann*, 227 F. 928.

officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.’’^{12a}

Here there is a public interest in the outcome of this case. If the court grant judgment it may be taken as sufficient basis for payment of money of the United States. Likewise, similar cases would follow the lines laid down herein. The entry of judgment would constitute a precedent for like action in numerous similar installations throughout the country.

But the Attorney General did not consent to this judgment since the United States Attorney expressly reserved upon the record the right to question the recovery of defendant from the Government. The question is, if judgment enter would protest avail in a proceeding by Kaiser Company against the United States where this claim had been paid with judicial sanction.

Then it is said that the Maritime Commission has reviewed the facts and has approved the stipulation and the entry of judgment for specified amounts against the defendant, and, of course, with the full knowledge that the fact of the judgment against defendant will be enforced as an obligation of the United States.

In a case where there was a stipulation purporting to reveal the administrative practice in applying the gift tax law, the Supreme Court refused to

^{12a}Young v. United States, 315 U. S. 257, 259.

follow or apply the practice as guiding or controlling judicial decision saying:

“Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law.” *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U. S. 39, 50-51.

If then, it can be contended that the Maritime Commission's approval of the stipulation tends to establish the appropriate administrative practice with reference to the facts, this court finds that the practice does not mark the channel of decision, and if the Commission attempts to point out the applicable law, this court is not bound thereby.

If it were established that the Maritime Commission had made an administrative determination of the validity of this claim, then this court would have no power to review it directly nor to add to their determination the weight of judicial sanction, because no act of Congress bestows such jurisdiction upon this court. Even if we had such jurisdiction

the basis of the administrative determination would have been examined anew in a case where there were actual adverse parties.¹³ It is no part of the duty of the court in this proceeding to relieve the Commission of the responsibility of determining whether these are claims properly payable by the United States. Even if the sole purpose was to enter this judgment in a convenient form for use in negotiations between the Kaiser Company and the Maritime Commission, it would be improper. The Supreme Court of Virginia has held that an action for damages will not lie against a state institution against which a judgment can not be enforced simply to fix damages in order to present a claim to the legislature. *Maia v. Eastern State Hospital* (1899), 97 Virginia 507.

The case of *Swift & Company v. United States*, 276 U. S. 311, shows clearly that the lower courts have the responsibility to refuse to enter a judgment where there is an attempt to base jurisdiction upon consent. The rule that a consent decree for an injunction in favor of the Government may be permissible should never be extended to imply liability of the United States for payment of money in a cause between third parties.

If the United States Maritime Commission is convinced of the justice of this claim, they may act on their own responsibility and without the adventitious aid of a judgment. There will then be no ap-

¹³*Old Colony Trust Company v. Commissioner of Internal Revenue*, 279 U. S. 716, 723, 724.

parent determination of issues of fact and law which have no basis in an actual case or controversy.

However, the court makes it plain that there are no intimations made as to the conduct of any party, attorney, agent or official of the Government in this case. But the court must not act unless it is given power, and should not act when vital interests of others might be affected.

Finally then, if all other reasons were laid aside, this is the one insuperable obstacle to the entry of this judgment. A judgment against defendant is a judgment against the United States. As Judge Dawkins says in the case above cited:

“The attempt to assert these claims in another state, because it has a longer period of limitations, certainly would work a decided prejudice, to the real defendant, the Government, if the plaintiffs, who brought their actions here, were permitted to dismiss them for the sole purpose of avoiding the effects of the delay in filing them.”

Even in private litigation the Supreme Court of the United States has set up adamant barriers against the settlement of the rights of third parties by agreement between two parties to the litigation.¹⁴ This principle is especially applicable where the interests of the United States Government might be prejudiced because its agents are myriad

¹⁴See also *Meeker v. Straat*, 38 Missouri Appeal Reports 239, 243; *Ward v. Alsup*, 100 Tennessee 619.

and its interests are far flung and well nigh universal. It has been said:

“The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be”¹⁵

The conclusion arrived at in that case may serve here. If the court acceded to the wishes of the parties, it might be said:

“A judgment entered under such circumstances, and for such purposes, is a mere form.
* * * A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.”

Unless other matter is shown, the cause will be dismissed.

[Endorsed]: Filed Dec. 23, 1946.

¹⁵Lord v. Veazie, 8 Howard 251, 255, 256.

[Title of District Court and Cause.]

Friday, December 20, 1946

Before: Honorable James Alger Fee,
Judge.

Appearances:

MOWRY & MOWRY, and
THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs.

FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

EXCERPTS FOLLOWING DELIVERY OF
OPINION ORALLY BY THE COURT

Mr. Rockwood: If your Honor please, may we have copies of that opinion from the reporter?

The Court: Yes. There are some minor corrections to be made, but as soon as that is done, I think during the course of the day, you can have it.

Mr. George Mowry: If your Honor please, may we have a few days to consider that opinion?

The Court: Oh, yes, certainly.

Mr. George Mowry: Will your Honor fix a time, or may we have a reasonable time?

The Court: Oh, I can't fix a date.

Mr. Rockwood: It was with some difficulty that I followed the very carefully considered statements of your Honor. There were two statements, I think, which were not squarely in accordance with the

facts and you might wish to correct your opinion before it is made public.

The Court: I should be glad to have it pointed out.

Mr. Rockwood: I just point this out, that you referred to the contract under which Kaiser Company was building ships as a cost-plus contract. That is not quite correct. It is a cost contract plus fees determined on a certain basis, which may or may not be directly related to costs.

And, furthermore, your Honor referred to profit to the defendant in the event of payment by the defendant of this judgment. I assume that your Honor believed that the amount of the compensation to Kaiser Company, resting in part on the cost of operating the shipyards, would be increased if this judgment were paid. That is not correct. The defendant will derive no profit or no increased compensation from the Maritime Commission as a result of the payment of this judgment if it were entered in accordance with the stipulation and were paid.

The Court: I am glad you called this to my attention. Of course, I did not have the contract before me, but was acting a little in the dark, but that is not my fault, if I may say so.

Mr. Tongue: Your Honor, I understand that your Honor is leaving town tonight and will be away for some time.

The Court: No, I am leaving tomorrow night.

Mr. Tongue: Well, whatever it may be, your Honor, I just wondered on this point, should the

parties decide that there is nothing further to present to the Court and that the case may be dismissed, will it be necessary to wait until your Honor returns, or what——

The Court: No, if you come to that determination the Court will sign a judgment any time you send it.

Mr. Rockwood: Your Honor understands that I have associated with me in this case San Francisco attorneys, particularly Mr. Gordon Johnson, and at the very earliest moment I will want to send him a copy of this opinion and probably discuss it with him, either by telephone or otherwise, and because of that circumstance I would hope that your Honor would defer the entry of any further order, maybe for as long as ten days, so we can have a chance to——

The Court: No, you won't be hampered at all in that regard. If you do not come to a place where both sides tell me that they are satisfied, I would require further hearing.

Mr. Rockwood: Thank you.

Mr. George Mowry: If your Honor please, it so happens that we directly represent these guards and I have been in constant touch with them, all fifty-two, and I would like to lay any foundation here that it is possible and necessary to make to preserve our right to try this case out. If your Honor adheres to this opinion in rejecting the stipulation, I would like to go on record that we want to try the case, and of course——

The Court: Well, the situation is that if the

case is left open and if there any further proceedings desired by either party, why, you may——

Mr. Mowry: Yes, your Honor, thank you very much.

The Court: ——take such action.

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, one of the Court Reporters of the above-entitled Court, duly appointed and qualified, do hereby certify that on Friday, the 20th day of December, A.D. 1946, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused to be transcribed into typewriting certain excerpts from said proceedings, and that the foregoing transcript, pages 1 to 4, both inclusive, constitutes a full, true and accurate transcript of said excerpts, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 21st day of December, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed Dec. 26, 1946.

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT
AND SUPPLEMENTAL COMPLAINT

Defendant, Kaiser Company, Inc., based upon stipulation and order of court, files its amended answer to plaintiffs' complaint and supplemental complaint herein and admits, denies, and alleges:

I.

Answering paragraph I of plaintiffs' complaint, denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

II.

Answering paragraph II of plaintiffs' complaint, defendant admits the following: It is, and at all times mentioned in said complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and operation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and

all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said complaint, to wit, October 25, 1945, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with

other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard; but the construction, maintenance and operation of said shipyard by defendant were at all times under the direction, supervision and control of the United States of America, acting by and through the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

III.

Answering paragraph III of plaintiffs' complaint, defendant admits the following: In the period of time referred to in said paragraph, and in connection with the construction, maintenance and operation of said shipyard as hereinabove in paragraph II expressly alleged, defendant engaged various persons as guards at said shipyard for the purpose of protecting property of the United States Government, the engagement of said persons by defendant being at all times subject to the direction, supervision and control of said Government, acting by and through the United States Maritime Commission, and said engagement by defendant being

for the use and benefit of the United States Government. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

IV.

Answering paragraph IV of plaintiff's complaint, defendant admits the following: At various times during the operation of said shipyard, as stated in paragraph II hereof, in the period of time referred to in the complaint, plaintiffs were engaged as guards at said shipyard, as alleged in paragraph III hereof. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

V.

Answering paragraph V to and including paragraph XXXVII of the complaint and paragraph I and paragraphs III to and including paragraph XX of the supplemental complaint herein, defendant admits the following: That the persons named in said paragraphs have employed attorneys to prosecute their respective claims referred to in the complaint and the supplemental complaint: and further admits that, subject to the admissions contained in its answer to paragraphs II, III and IV of the complaint, the persons named in the above-mentioned paragraphs of the complaint and the supplemental complaint were engaged as guards at the shipyard referred to in the complaint and supplemental complaint. Except as herein expressly

admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraphs and each thereof.

VI.

Answering paragraph II of the supplemental complaint, in so far as said paragraph adopts paragraphs II, III and IV of the original complaint, defendant realleges the matters set forth in paragraphs II, III and IV above of this amended answer. Except as herein expressly admitted, defendant denies each and every, all and singular, and generally and specifically, the allegations contained in said paragraph II of the supplemental complaint.

As and for a first, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The rights of action set forth in the complaint and supplemental complaint are for trifling periods of time and sums due and are within the doctrine expressed in the legal maxim "de minimis non curat lex."

As and for a second, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant is, and at all times mentioned in said complaint and supplemental complaint was, a cor-

poration organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and operation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies, and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said complaint and supplemental complaint, to wit, October 25, 1945, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the

United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard.

II.

By reason of the foregoing, the United States is the real party in interest and the true defendant in the above-entitled action and, by reason of not having consented to be sued in an action of the character and involving the amount set forth in the complaint and supplemental complaint herein, enjoys sovereign immunity from suit on the causes

of action referred to in said complaint and supplemental complaint.

As and for a third, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

By reason of the foregoing the United States of America is in fact and in law the employer of plaintiffs named in the complaint and supplemental complaint insofar as the activities referred to in said complaint and supplemental complaint are concerned; and inasmuch as the United States of America is excluded from the term "employer" as used in the Fair Labor Standards Act of 1938, plaintiffs are not entitled to the benefits of said Act and said Act is not applicable to them in connection with the matters referred to in the complaint and supplemental complaint.

As and for a fourth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

The foregoing activities of defendant were carried on under cost-plus-a-fixed-fee management contracts or price-minus contracts with the United States Maritime Commission, all of which contracts were management contracts under which the principal function of defendant was to furnish managerial "know-how" for the construction, maintenance and operation of a shipyard belonging to the United States of America and under which the defendant was at all times subject to the direction, supervision and control of the United States of America in carrying on its sovereign function of prosecuting a war and procuring the necessary equipment, supplies and material necessary for such war prosecution.

III.

Such activities of the United States Government, and of defendant on its behalf and subject to its direction, supervision and control, do not constitute commerce within the meaning of the Fair Labor Standards Act of 1938.

As and for a fifth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense and paragraph II of its fourth affirmative defense.

II.

The activities of defendant, as aforesaid, were as an instrumentality of the United States of America and by reason thereof, as such instrumentality, defendant enjoys, in connection with the matters referred to in the complaint and supplemental complaint herein, sovereign immunity from suit on such matters.

As and for a sixth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The claims and causes of action referred to in the complaint and supplemental complaint herein arose prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947.

II.

The activities of plaintiffs were and are not activities which were compensable by either:

(a) An express provision of a written or non-written contract of employment in effect at the time of such activities, between plaintiffs (or their agent or collective bargaining representative) and defendant; or

(b) A custom or practice in effect, at the time of such activities, at the establishment and place of employment of plaintiffs, to wit, at Swan Island shipyard, covering such activities.

III.

By reason of the foregoing, under Section 2(a) of the Portal-to-Portal Act of 1947, defendant is not subject to any liability under the Fair Labor Standards Act of 1938, as amended, in connection with the matters referred to in the complaint and supplemental complaint herein.

As and for a seventh, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraphs I and II of its sixth affirmative defense.

II.

By reason of the foregoing, under Section 2(d) of the Portal-to-Portal Act of 1947, this court is without jurisdiction of this action and is without jurisdiction of each and every claim and cause of action referred to in the complaint and supplemental complaint herein.

As and for an eighth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The matters and claims referred to in the complaint and supplemental complaint herein relate to and are based on acts or omissions of defendant

prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947, and relate to the failure of the defendant, as the alleged employer of plaintiffs, to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

II.

The acts or omissions of defendant complained of in said complaint and supplemental complaint herein were in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals, and interpretations of the United States Maritime Commission, an agency of the United States, and in conformity with and in reliance on administrative practices and enforcement policies of such agency, with respect to the class of employers to which defendant belonged.

III.

By reason of the foregoing, pursuant to Section 9 of the Portal-to-Portal Act of 1947, defendant may not be subjected to any liability for or on account of the matters referred to in the complaint and supplemental complaint herein.

As and for a ninth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The acts or omissions of defendant referred to in the complaint and supplemental complaint herein and giving rise to the above-entitled action and the

causes of action set forth in the supplemental complaint, were performed, committed, or omitted by defendant in good faith and with reasonable grounds for belief that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended.

II.

By reason of the foregoing, pursuant to Section 11 of the Portal-to-Portal Act of 1947, this court, in its sound discretion, should award no liquidated damages to plaintiffs referred to in the complaint or supplemental complaint.

Wherefore, defendant prays that plaintiffs named herein and in the supplemental complaint take nothing, and that defendant may be hence dismissed with its costs.

/s/ RICHARD DEVERS,
HART, SPENCER, McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

Service acknowledged.

[Endorsed]: Filed Sept 22, 1947.

[Title of District Court and Cause.]

ORDER SETTING CASE FOR
PRE-TRIAL CONFERENCE

Plaintiff appearing by Mr. Edwin D. Hicks, of counsel, and the defendant by Mr. Richard Devers, of counsel.

It Is Ordered that this cause be and it is hereby set for pre-trial conference for Monday, November 17, 1947.

[Title of District Court and Cause.]

MOTION FOR ENTRY OF STIPULATED
JUDGMENT OR, IN THE ALTERNATIVE,
FOR ENTRY OF SUMMARY JUDGMENT
OR FOR LEAVE TO FILE SUPPLE-
MENTAL COMPLAINT

Come now the plaintiffs and move the Court as follows:

1. For the entry of judgment in the form heretofore submitted and filed herein by the parties hereto, together with their stipulation that said judgment be entered herein, pursuant to Rule 68 of the Federal Rules of Civil Procedure; or, in the alternative, and in said motion be denied,

2. For the entry of a summary judgment in favor of plaintiffs for the relief demanded in the affidavit attached hereto, marked Exhibit A, pursuant to Rule 56 of the Federal Rules of Civil

Procedure, upon the ground that the parties hereto have compromised and settled the issues involved in this case; that said compromise and settlement was of a bona fide dispute as to the amounts payable by defendant, as employer, to plaintiffs, as its employees, pursuant to a cause of action or an action to enforce a cause of action arising under the Fair Labor Standards Act of 1938, 28 U.S.C.A. sec. 201 ff; and that said compromise or settlement was authorized by and under said Act and was also thereafter authorized, approved and ratified by and under section 3 (a) and (d) of the Portal-to-Portal Act of 1947, 28 U.S.C.A. sec. 253 (a) and (d); or, in the alternative, and if said motion be denied, then

3. For leave to file the proposed supplemental complaint attached hereto, pursuant to Rule 15 (d) of the Federal Rules of Civil Procedure.

HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE, III,

Of Attorneys for Plaintiffs.

Service excepted.

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, Thomas H. Tongue, III, being first duly sworn, on oath, depose and say:

1. That since the filing of the complaint herein on December 7, 1945, I have been one of the attorneys for plaintiffs.

2. That shortly after the filing of said complaint negotiations for settlement of the case were entered into by and between attorneys for plaintiffs and attorneys for defendant.

3. That as a result thereof a compromise and settlement was agreed upon according to the terms of the stipulations and proposed form of judgment filed herein; that in the course hereof attorneys for defendant submitted to attorneys for plaintiff a proposed form of judgment to be entered herein, together with a proposed form of stipulation for the entry of said judgment; that said proposed form of judgment was accepted and approved by attorneys for plaintiffs and said stipulation for the entry thereof was signed by attorneys for both parties.

4. That the terms of said settlement were duly approved on behalf of the United States by both the United States Maritime Commission and the United States Attorney.

5. That on April 19, 1946, said stipulation and proposed form of judgment were duly filed herein and attorneys for both parties requested that said judgment be entered, but that Court directed that a further hearing be held for the taking of testimony before deciding whether to approve and enter said judgment and that on April 22, 1946, such a further hearing was held.

6. That at said hearings it appeared from the testimony of several of the plaintiffs, from the testimony of other witnesses, and from statements of counsel for both parties that there was no dispute as to any question of law and that it was admitted by defendant that it was subject to and that plaintiffs were covered by the Fair Labor Standards Act of 1938, but that a dispute existed as to the number of overtime hours worked by plaintiffs each week; that a transcript of the testimony at said hearings is available and will be furnished to the Court if requested.

7. That on May 13, 1946, the Court, in an oral statement, indicated that the transaction was fair and regular and an appropriate settlement which the Court would approve without question were it not for the problem whether, in view of the decision in *D. A. Schulte v. Gangi*, 90 L. Ed. 873, the Court had power to approve the settlement, and it was agreed that the parties might submit briefs upon that question.

8. That on June 27, 1946, plaintiff filed its memorandum in support of said settlement and of

said proposed judgment and stipulation and on July . . ., 1946, defendant filed its memorandum in support thereof and in said memorandum made the following statements:

(a) "The testimony given at the hearing was typical of that which is to be expected in any litigation. The plaintiffs who testified stated that they were required to report one-half hour early every day during their employment for the purpose of roll call, inspection and other preliminary duties; although one of these witnesses conceded that for a time at least the periods required for the roll call and inspection might have been less than one-half hour.

"The testimony of defendant's representative, Mr. W. L. Tuson, contradicted the assertion of plaintiffs that they reported one-half hour early during every day of their employment. Mr. Tuson stated that originally the guards had been instructed to report one-half hour early, but that in actual practice this rule was not enforced, that the time was gradually cut down, and that in fact many guards reported simply at the beginning of the shift, or even reported late for work. He indicated that the time required for the roll call was a varying figure, running from five minutes to thirty minutes. Furthermore, Mr. Tuson testified that there were no existing records from which an exact determination of the time spent by the

plaintiffs for roll call and inspection could be made at the present time.”

(b) “We submit that upon analysis the statements do not present an issue with respect to coverage. It was conceded that the Company itself was engaged in commerce or the production of goods for commerce so that its operations fell within the coverage of the Fair Labor Standards Act. The particular situation to which Mr. Rockwood referred was the question as to whether the fact that a guard, in the course of rotation from post to post, worked one day inside the shipyard fence (concededly engaged in the production of goods for commerce) and another day worked outside the fence (possibly not engaged in the production of goods for commerce) destroyed the guard’s rights under the Act during the time spent outside the shipyard proper.

“Since the proceedings of May 13, 1946, an investigation has been made in an effort to determine whether any of the plaintiffs in the present action spent a full work week in beyond the fence activities, and no such case has been discovered. It must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are no facts with respect to the plaintiffs

here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, and defendant therefore waives any such point which may have been raised by the remarks of its counsel which were referred to by the Court.

“The ultimate fact is that the real dispute in this case relates to the amount of time which the plaintiffs were required to spend in reporting for roll call and inspection. That is a factual question on which the parties have agreed by this stipulation.

“If the Court deems it necessary that the record be clarified, defendant respectfully suggests that the parties be permitted to amend Paragraph 4 of their stipulation by confining their statement of the controversy to what is basically the issue of the case, namely, the hours worked by the plaintiffs.”

A copy of said memorandum is attached hereto marked Exhibit 1 and by the reference made a part hereof.

9. That on December 20, 1946, this Court issued a written opinion disapproving said proposed judgment and stipulation for reasons stated therein.

10. That on January 31, 1947, plaintiffs filed certain interrogatories herein; that on February . . , 1947, and March 18, 1947, defendant secured orders extending their time to answer or object to said interrogatories; that on April 8, 1947, defendant filed objections thereto and on May . . , 1947, said

interrogatories were withdrawn under order of the Court.

11. That during this time the Portal-to-Portal Act was pending in Congress and the parties hereto were awaiting its provisions as they might apply to this case; that on May 14, 1947, said Act was duly adopted, and that during the weeks immediately following both of the parties hereto attempted to secure authorization from the U. S. Maritime Commission to authorize defendant to make payments to plaintiffs in accordance with the aforesaid stipulation and proposed judgment, but without success.

12. On September 12, 1947, defendant secured an order extending its time to file an amended answer herein and on September 22, 1947, filed such an amended answer.

13. That on November 18, 1947, the case was set for pre-trial conference; that a transcript of said proceedings is unavailable due to the death of the court reporter at that time and the fact that his stenographic notes now appear to be illegible for the most part, but that it is the recollection of affiant, as indicated in a letter written the next day—that

“* * * all of the other wage-hour cases were assigned to Judge McColloch, and Judge Fee was unable to take up these cases, due to other pre-trial conferences yesterday and due to jury trials in his court for the balance of the week. Accordingly, the case has been postponed in-

definitely for the resetting of a pre-trial conference at a later date.”

14. That no call date, pre-trial date or otherwise has been set by the Court for this case from November 18, 1947, until December 5 and 12, 1949, at which time it was indicated by the Court that said case might be dismissed for lack of prosecution.

15. That immediately following November 18, 1947, the case of *Potter v. Kaiser Company, Inc.*, Civil No. 3030, was tried before Judge McColloch; that except for the question of compromise and settlement, and except as changed or modified by the testimony and admissions referred to hereinabove in Paragraphs 6 and 8, the facts of that case are identical with the facts of this case on the questions of coverage under the provisions of the Fair Labor Standards Act and upon all of the questions raised by this Court in its opinion of December 20, 1946, namely:

“(a) there is a question as to whether the Kaiser Company, Incorporated, was engaged in the production of goods for commerce; (b) there is a question of whether these individual men were engaged in the production of goods for commerce either directly or indirectly even when they were guarding the main installations of the shipyard; (c) there is a question whether all of these men were engaged at all times in the production of goods for commerce when they were guarding other installations only indirectly *connection* with the construction; (d)

there is a question of whether plaintiffs should be entitled to compromise their individual claims whether effecting coverage or not; (e) there is a question of whether the Kaiser Company, Incorporated, while it was engaged in the production of ships for the war effort under a cost contract plus fees in production of goods for the United States came within the purview of the Fair Labor Standards Act; (f) there is a question of whether the Maritime Commission as an administrative body can adjudicate these rights and agree to pay the same and have a judicial decree entered enforcing their determination; (g) there is a question of whether the United States can be rendered liable by stipulation, judgment or otherwise for overtime pay under the Fair Labor Standards Act; (h) there is a question of whether the United States can be rendered liable either by stipulation or judgment for a penalty imposed on private employers for failure to obey the mandates of the Fair Labor Standards Act of 1938."

16. That a transcript of the testimony in the Potter case, *supra*, is attached hereto, marked Exhibit 2, and by this reference made a part hereof. That the exhibits in said case are now in custody of the Clerk of this court in said case. That it is the understanding of affiant that the parties to the Potter case will stipulate that the court may release said exhibits; that defendant herein will stipulate that said transcript and exhibits may be made a

part of the record in this case and that it can be stipulated that, with the exceptions noted above, the facts of this case on the above questions, insofar as they involve questions of fact, are the same as appears from said testimony and exhibits in the Potter case, *supra*.

17. That in view of the common questions involved, both of the parties hereto desired to and did refrain from taking any affirmative action in this case pending the trial and appeal of the Potter case, *supra*, which was not decided by the Circuit Court of Appeals until January 10, 1949.

18. That for several months thereafter counsel for plaintiffs were both extremely busy with other litigation of considerable importance and also undecided as to what course of action to take in this case in view of the fact that this Court had declined to approve the aforesaid settlement and the Circuit Court of Appeals in the Potter case appeared to have foreclosed recovery on the merits of the original cause of action, but that said counsel at all times took the position that said settlement was legal and binding.

19. That affiant and other counsel for plaintiffs also relied upon their understanding of the practice of this court to the following effect: that the Court periodically and on its own motion sets cases upon the call calendar and does not allow cases to become stale before setting them for call, as the experience of these and other counsel has shown and as they

have come to rely; that it is ordinarily for the Court to set cases for pre-trial and trial; that once a case is at issue the Court will normally of its own motion set it for call at its early convenience for the purpose of setting a date for pre-trial and trial at its convenience and that of the parties; and that, accordingly, it is unnecessary, if not improper in the ordinary case and in the absence of emergency for counsel to presume to attempt on their own motion to have a case set for pre-trial and trial until it has been set for a call date.

20. That, in addition thereto, it has been common knowledge that Judge James Alger Fee, before whom this case was and is now pending, has been required to be absent from this Court for considerable periods of time during the past two years and, in particular, since the decision in the Potter case, *supra*, in January 10, 1949, because of his assignment for the trial of cases in other states and for service upon the Circuit Court of Appeals and other necessary duties, and that these duties required his absence for extended periods during the months of January, February, March, May, June, August, September, October and November of 1949; that he found it necessary to absent for a period of approximately 10 weeks immediately prior to November 14, 1949, and that it was within a month of his return that this case was placed on the call calendar.

21. That it is also the understanding of affiant and of other counsel for plaintiff, based on past experience, that once a case has been assigned to

one judge it is improper, in the absence of emergency, to ask any other judge to consider any matter involving the case; that if such is done the other judge will ordinarily postpone the matter until the original judge can consider it or, if out of the city, until he returns; and that for this reason affiant did not consider it either necessary or proper to take up this case with any other judge.

22. That affiant recognizes that there were probably numerous occasions when he could have taken up this case with this Court, but for the above stated reasons did not consider that it was necessary to do so and, at least, considered that it was neither improper nor evidence of a lack of proper diligence to wait until the case was next placed by the Court upon its call calendar.

23. At no time did plaintiffs or affiant or other counsel for plaintiffs intend to discontinue the prosecution of this case, or, in particular, to waive, abandon or relinquish their position that the compromise and settlement previously arrived at, as stated in the stipulation and proposed judgment filed herein, was valid and binding on both parties, despite the disapproval of this Court.

24. Accordingly, and in the interests of their clients, the plaintiffs herein, affiant and other counsel for plaintiffs, respectfully request the Court for an opportunity to demonstrate why, as a matter of law and under the agreed facts of this case, as stated above, plaintiffs are now entitled to the entry of judgment in the form of the proposed judgment

heretofore filed herein and in accordance with the stipulation of the parties filed herein, particularly because of the provisions of the Portal-to-Portal Act referred to in the foregoing motion and which were not in effect at the time of the disapproval of the proposed judgment by this Court.

25. Therefore, it is respectfully submitted that this is a proper case for consideration on the foregoing motion for entry of Judgment for the reason that it was originally stipulated that judgment be entered and that there is no bona fide controversy over any material fact but solely as to questions of law arising from the admitted and agreed facts. It is thus requested that a hearing be set on the merits of the foregoing motion and that judgment be entered in accordance with the terms of the proposed judgment and stipulation previously filed herein.

/s/ THOMAS H. TONGUE, III.

Subscribed and sworn to before me this 19th day of December, 1949.

[Seal] /s/ W. CASE,

Notary Public for Oregon.

My Commission Expires: 3/14/53.

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and for supplemental complaint herein by reason of facts occurring since the original complaint was filed herein allege as follows:

I.

That jurisdiction of the Court over the cause of action alleged herein is based upon Rule 15(d) of the Federal Rules of Civil Procedure and upon Section 3(a) and (d) of the Portal to Portal Act of 1947 and also upon the fact that all of the plaintiffs are residents and inhabitants of states other than that of the defendant herein and that this cause involves the claim of plaintiffs for in excess of \$3,000.00.

II.

That since the filing of the complaint herein and on or about April 19, 1946, the parties hereto agreed upon a compromise and settlement of this cause and said compromise and settlement was duly approved on behalf of the United States by the U. S. Maritime Commission and United States Attorney; that said cause is a cause of action or a cause to enforce a cause of action arising under the Fair Labor Standards Act of 1949; that said compromise and settlement was of a bona fide dispute as to the amounts payable by defendant, as employer, to plaintiffs, as employees, required to be under and by virtue of said Act and was a compromise and settlement authorized by and under said Act and

was also thereafter authorized, approved and ratified by and under Section 3(a) and (d) of the Portal to Portal Act of 1947.

III.

That said compromise provided that defendant should pay to plaintiffs the sum of \$17,387.83, all as itemized and set forth more particularly in the schedule attached hereto, marked Exhibit A, and by this reference made a part hereof, together with \$3500.00 as attorneys' fees and \$17.48 as costs.

IV.

That thereafter defendant refused and still refuses to make the payments agreed upon under said compromise and settlement.

Wherefore, plaintiffs pray for judgment against defendants in the sum of \$17,387.83 and for the sum of \$3500.00 as attorneys' fees and \$17.48 for costs and disbursements.

HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE III,

/s/ JOHN MOWRY,

Attorneys for Plaintiffs.

EXHIBIT A

Name	Total
Macklin, L. I.....	\$ 348.56
Maple, Len A.....	560.10
Hess, George W.....	223.73
Yeo, R. F.....	598.95
Sundberg, Erick E.....	300.63
Stoneman, J. H.....	527.94
Imus, W. G.....	626.67
Culver, C. E.....	428.42
Warrick, A. F.....	196.02
Hill, John J.....	630.70
Knox, J. J.....	559.54
Johnson, E. R.....	455.60
Williams, M. F.....	595.78
Weigel, H. J.....	350.47
Hanson, H. O.....	527.20
Todd, Arthur B.....	215.68
Holden, John T.....	118.86
Rogers, S. M.....	188.30
Chase, Daniel J.....	523.06
Popma, John.....	641.97
Nickels, George F.....	130.64
Penniwell, R. J.....	464.03
Craig, T. W.....	487.85
Carlyle, Herbert J.....	60.65
Bryant, James O.....	99.28
Dean, G. G.....	60.81
Cronin, J. E.....	531.02
Carr, H. E.....	550.05
True, G. O.....	89.18
Rawls, O. L.....	334.41

Exhibit A—(Continued)

Name	Total
Peddicord, W. J.....	404.99
Bjornsgaard, O. P.....	601.79
Glennon, Arthur E.....	426.81
Lancaster, Orval L.....	244.33
Cox, W. J.....	279.75
Krigbaum, Claude F.....	74.97
Collier, L. W.....	67.80
Van Hook, John H.....	426.66
Johnson, Arthur E.....	305.54
Nordeide, R. I.....	429.14
Mainard, Lee.....	81.42
Cash, B. L.....	437.32
Hunt, Perry.....	103.17
Monrean, Charles H.....	510.79
Taulbee, W. T.....	244.09
Dopp, George E.....	388.12
Maynard, Theodore F.....	74.74
Long, Marion M.....	241.22
Griffin, W. C.....	142.24
Wilson, Charles J.....	476.84

Total\$17,387.83

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

December 12, 1949

Before: Honorable James Alger Fee,
Judge.

Appearances:

MR. THOMAS H. TONGUE,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: Call calendar. Civil 3000, Macklin v. Kaiser.

Mr. Tongue: If the Court please, I reported to the Court last week that I had not received instructions from Mr. Mowry in behalf of plaintiffs as to what his intention was as to proceeding with the case. I now have had that opportunity, and on behalf of plaintiffs we will desire to continue the case. We would like to have one week in which to further plead or to file a motion, perhaps, for leave to file a supplemental complaint in the case. We will want to continue the case, your Honor, and this litigation.

The Court: I don't know whether I am going to do that or not. This has been lying here for years.

Mr. Tongue: That is right.

The Court: I gave you to this time on the theory that you were going to get rid of it and settle it.

Mr. Tongue: We have been unable to reach a settlement. Much of that time, of course, we were both waiting to see what the court did in the Potter case on the appeal. If your Honor desires to dismiss it we naturally cannot consent to it, and we would like to have an opportunity to preserve our record in that respect.

The Court: It lays here for years and then you come in and ask to amend the pleadings after that length of time. I think you are asking a good deal of the Court.

Mr. Tongue: This case has involved rather peculiar circumstances, your Honor. You will recall, of course, that it was filed prior to the passage of the Taft-Hartley Act, and over a year after it was filed the Taft-Hartley Act was passed. Then the portal-to-portal act was passed, and then the Potter case [2*] went up on appeal. That was as not decided until sometime early this year. Now I grant that perhaps all of us have not been as diligent as we should have been in pursuing the matter, but it is at issue and has been for some time. As the pleadings now stand the defendant has filed an answer, so that it is at issue on that answer.

The Court: What is the point about it? Why haven't you tried it in all of these years?

Mr. Tongue: I have no further explanation other than that to give your Honor.

The Court: The Potter case has been tried. Why wasn't this one tried?

Mr. Tongue: We didn't feel that we wanted to incur the expense to ourselves and our clients to try

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

this case if it was not necessary until the Potter case was decided on appeal.

The Court: The Potter case has now been decided, and now you decide, in the face of the Potter case, that you are going to go ahead.

Mr. Tongue: Yes, that is right.

The Court: Of course, you know I could have treid this case a good many years ago, as far as I am concerned.

Mr. Tongue: I realize that.

The Court: I think that there wasn't anything in the case before the passage of the Taft-Hartley Act, and I don't think so yet, as far as I am concerned. [3]

Mr. Tongue: I understand that. We simply want to protect our record, your Honor.

The Court: What do you want to do? File an amended complaint?

Mr. Tongue: That is our desire, and we would like one week in which to file a motion for leave to do so, and then your Honor could decide whether you want to allow us to do that or not, if you don't want to make that decision now.

The Court: I will hold it for dismissal for failure to prosecute, but you can tender an amended complaint. I will look your amended pleading over and see whether I think there is any grounds to go ahead.

Mr. Devers: If your Honor please, I understand that the supplemental complaint which counsel propose to file may be based upon a new cause of action. If that is the case, I think we want to bring the

Maritime Commission up to date on the case and be guided by their instructions. We may want to oppose that, if it is done on motion.

The Court: I am saying that I am not doing anything. I am holding this case for dismissal. I think there has been a great deal of laches and lack of diligence upon the part of plaintiffs to ever want to try this case. Now, obviously enough, I am not going to allow a different cause of action, but I will give them the opportunity to tender an amended complaint. If I am not satisfied with the amended complaint I am going to dismiss this [4] for failure to prosecute. There has been a failure to prosecute for a great many years, and I am not going to be very much disturbed by the suggestion that there may be a new cause of action injected into it. So you may tender any complaint that you want to in a week.

Mr. Tongue: One week, your Honor. It will probably be a supplemental complaint we would like to tender, if we may do that.

The Court: Yes, that is all right. You can tender it. As I say, I think I am going to dismiss this case, but I want to know what you have in mind.

Mr. Tongue: Yes, very well.

The Court: I think you have been out of court for several years myself.

(Whereupon proceedings in the above matter on said day were concluded.)

[Title of District Court and Cause.]

January 3, 1950

(The following further oral proceedings were had herein:)

Appearances:

MR. THOMAS H. TONGUE,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

Mr. Tongue: May it please the Court, this is a motion on behalf of plaintiffs in the case of Macklin, and others, vs. Kaiser Company, Civil No. 3000.

This motion is in alternative form. The first alternative asks for the entry of judgment based on stipulation of the parties previously filed herein. The second alternative asks for the entry of judgment as previously stipulated by the parties as a matter of summary judgment based on an affidavit showing, as we contend, that there is no genuine issue as to any disputed fact. The third alternative, in the event the other two are denied, is for leave to file a supplemental complaint setting up a cause of action based on what we claim to be a compromise settlement effected by the stipulation filed in this case.

Before proceeding further, however, there is the matter which your Honor mentioned at the last call of this case. That is whether, in view of the lapse

of time, the plaintiff will be permitted to proceed further or whether the case will now be [6] dismissed for lack of prosecution. As to the reasons why plaintiffs submit that they should be permitted to proceed further with this case we refer the Court to the affidavit attached to our motion. I think to save time if the Court desires simply to look over that affidavit rather than for me to summarize it——

The Court: I have read it, Mr. Tongue.

Mr. Tongue: I think, though, I would like to have the record show, if it is a fact, and I understand that it is, that counsel for defendant is not joining in a request that the case be dismissed for lack of prosecution and does not, so far as the defendant is concerned, object to plaintiffs continuing with this case. Is that correct, Mr. Devers?

Mr. Devers: In so far as dismissal for want of prosecution is concerned that is correct, your Honor.

The Court: I think in view of that situation the Court will not dismiss the case on its own motion.

Mr. Tongue: Very well. I appreciate that, your Honor. Now, so far as the merits of the motion are concerned, your Honor, I won't cover the matters that have been previously considered by the Court.

(The motions herein were argued at length by counsel, during the course of which the following occurred:)

Mr. Devers: Now, as I understand that as to the motion for [7] the entry of summary judgment based upon the affidavit which counsel has filed it is his position that if some of the issues, the legal

questions, which were raised in the Court's opinion heretofore filed or any part of them still need to be tried, then it is the suggestion of counsel that the record in the Potter case is adequate to enable the Court to determine those questions. Now we agree, subject to the Court's approval, of course, that the record in the Potter case on those issues is pertinent to this case, and we would be willing to stipulate that it become a part of the files and records of this case. I would like to reserve, however, in so far as the defendant is concerned, the opportunity if we reach that stage in this case to determine whether or not that record is wholly in and of itself adequate to enable the Court to determine those issues.

The Court: I am going to state right now if I ever proceed with this case any further we are going through a pre-trial conference and trial and everything else. I am not going to decide it on anybody else's record. If you want to introduce that record at the trial, that is another thing. I am not going to permit this to proceed upon the stipulation of counsel that some other record controls. I am going to find out before we start into this thing what the issues are to try, and I am going to find that out by pre-trial conference. When we get through with that, then I will make up my mind, and I imagine at that time both counsel will want to make up their minds, as to whether they are going to want to introduce other evidence or not.

Mr. Devers: I understand.

Mr. Tongue: That is agreeable with us, your Honor.

(Further argument by counsel.)

The Court: Of course, there is one thing that is outstanding in this argument, and that is the entire disregard of the suggestion made by the Court in its previous opinion that the Government of the United States is a party in interest, which everybody knows. I know it and all the rest of you know it. Now what are you going to do about that?

Mr. Tongue: As I recall the record, your Honor, Mr. Hess did appear here in this Court and indicated on behalf of the United States that the United States had approved the settlement. Now there was not a formal appearance as a party by the United States.

The Court: He very carefully guarded himself in making those statements, as the record will show.

Mr. Tongue: Yes.

The Court: He made a lot of qualifications, and I took it that he was not appearing in behalf of the United States. He put himself in here as being more or less attending at the request of the Court.

Mr. Tongue: As I understood the opinion, while it was true [9] that the Court raised the question squarely as to whether the Kaiser Company was an employer in its own right or whether it was simply an agent of the United States, my understanding, although it may have been mistaken, of what the Court had in mind was that there should be perhaps evidence on that question in this case that would reveal that status of the defendant as to whether it was an employer or an agent. I did not understand that to be a suggestion that the Government should be made a formal party to these proceedings.

The Court: No; what I said was that you could not compromise these claims which eventually would have to be paid by the Government of the United States in this lawsuit between the two of you without the Government being here.

Mr. Tongue: Yes.

The Court: That is what I said in the opinion, and I still think that that position is a good one.

Mr. Tongue: Our position is that there is an adequate showing that the Government has consented to the settlement. There is, I believe, as an exhibit in this case a telegram from the Maritime Commission to that effect, and there was also the appearance of the U. S. Attorney indicating, at least to my understanding, that the Government consented and agreed to the settlement.

The Court: The Government was not a party.

Mr. Tongue: Of course, from our standpoint it was not [10] necessary to make the Government a party.

The Court: I still think that there is this proposition that you have to get around somehow, and I don't see that anybody has gotten around it, that the Government of the United States is ultimately responsible. I said that you could not settle this case between yourselves in this lawsuit, between Macklin and the Kaiser Company, and it was beyond the power of the Court to enter any such judgment. I have seen yet no escape from it, and I don't see any here. I am not going to rule just at present. I will give you time to look this over, but

I just don't see any escape from the previous opinion.

Mr. Tongue: May we have an opportunity to examine that question and file a memorandum on it?

The Court: Yes.

Mr. Devers: If the Court please, may I ask whether, in order that I understand the Court's position, that is the only barrier raised by the Court's opinion now on file to the entry of judgment?

The Court: The Court's opinion is on file, and it speaks for itself. That is all I can say about it.

Mr. Devers: Very well.

Mr. Tongue: I think that is all, your Honor.

(Whereupon proceedings in the above matter on said day were concluded.) [11]

July 3, 1950

(The following further oral proceedings were had herein:)

Appearances:

MR. EDWARD D. HICKS,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

The Court: Civil 3000. Macklin v. Kaiser.

Mr. Hicks: May it please your Honor, the various motions or, rather, alternative bases for relief on motion have been submitted to the Court and

briefs have been filed. I believe it is in that status and I think all that remains is for your Honor to make a ruling. As I understand it, it is in the bosom of the Court.

The Court: I see. I don't know how it got on this calendar, because it is not on my submitted book. If that is the size of it I will go ahead and dispose of it.

Mr. Hicks: That is my understanding.

Mr. Devers: That is right. I might say, if the Court please, a memorandum has been filed by plaintiff in the case but the defendant has not filed any memorandum of authorities. I think your record shows that.

The Court: You don't want to?

Mr. Devers: No, we don't propose to, if the Court please.

The Court: That is the point about it. That is how it [12] happens not to have been brought in to me as submitted, because you didn't file anything. They were holding it, apparently. If that is your conclusion I will now proceed to dispose of it.

Mr. Devers: I might say, your Honor, for the record and for the Court's information also that the defendant entered into a stipulation, which is of record in the case, in good faith and the defendant is willing to abide by the stipulation and has no objection to the entry of judgment in accordance with the stipulation.

Mr. Hicks: I can't inform your Honor whether or not the Maritime Commission, who initially had some information in this, has entered any objection.

I can't make any representation on that, but certainly none has come forward that we know of, or any objection on the part of any governmental agency.

The Court: No, I don't think they would object. The question is whether I will go along with you.

Mr. Hicks: Yes, I understand.

The Court: That is the question in this case.

(Whereupon proceedings in the above matter on said day were concluded.) [13]

[Title of District Court and Cause.]

July 31, 1950

Before: Honorable James Alger Fee,
Judge.

PROCEEDINGS

The Court: In the case of Macklin vs. Kaiser Company, Civil 3000, the Court has again reviewed this situation and finds now that there are motions on file in this case. After the Court had suggested a dismissal for want of prosecution plaintiff filed a three-pronged motion demanding judgment in accordance with a stipulation which was for judgment, and which was apparently with the consent of the Maritime Commission of the United States. The Court in its previous opinion announced that there would be no judgment in accordance with the stipulation, and the Court disapproved the entire proceeding. [14] Therefore, the Court will not grant that phase of the motion.

Likewise, there is a motion for summary judgment on the record. The record does not show jurisdiction of the Court, and therefore the Court is not going to grant any summary judgment on the record.

Permission is asked to file a supplemental complaint. This phase of the motion is also denied because of the fact that there is no basis for filing a supplemental complaint at the present time. The situation has not changed whatsoever, and this matter was all gone through before the original passage of the Taft-Hartley Bill, which would seriously affect it. *Bonner vs. Elizabeth Arden, Inc.*, Second Circuit, 177 Fed. (2d) 703, is squarely on the point. That says it is not proper to permit a supplemental complaint to be filed under those circumstances.

The Court was well advised to dismiss this case for want of prosecution. The matter has been pending here for a great length of time, and the Court announced its opinion several years ago, in 69 Fed. Supplement at 137.

This case was originally filed relating to overtime work supposed to have been done by guards at the Kaiser plant. Under the circumstances the Court sees no reason why some action has not been taken, the original complaint being filed December 7th, 1945. [15]

Therefore, the cause is now dismissed for want of prosecution, and the Court will set up in the order all of the delays that have taken place in a period of some five years. [16]

REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on December 12, 1949, January 3, July 3, and July 31, 1950, I reported in shorthand the proceedings had in the above-entitled matter; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to 16, both inclusive, constitutes a full, true and correct transcript of said proceedings (excluding argument on the motions January 3, 1950) so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 16th day of September, 1950.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed Oct. 2, 1950. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that L. I. Macklin, Len A. Maple, George W. Hess, R. F. Yeo, Erick E. Sundberg, J. H. Stoneman, W. G. Imus, C. E. Culver, A. F. Warrick, John J. Hill, J. J. Knox, E. R. Johnson, Mr. F. Williams, H. J. Weigel, H. O. Hanson, Arthur B. Todd, John T. Holden, S. M. Rogers, Daniel J. Chase, John Popma, George F. Nickels,

R. J. Penniwell, T. W. Craig, Herbert J. Carlyle, James O. Bryant, G. G. Dean, J. E. Cronin, H. E. Carr, G. O. True, O. L. Rawls, W. J. Peddicord, O. P. Bjornsgaard, Arthur E. Glennon, Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, L. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theodore F. Maynard, Marion M. Long, W. C. Griffin and Charles J. Wilson, the plaintiffs above named, and each of them, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order and judgment of this Court, made and entered on July 31, 1950, dismissing the above cause for want of prosecution and denying plaintiffs' motion filed herein on December 19, 1949, praying for entry of judgment, for entry of summary judgment, or, in the alternative, for leave to file a supplemental complaint herein.

Dated August 30, 1950.

/s/ HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE, III,

Attorneys for Appellants.

Service accepted.

[Endorsed]: Filed Aug. 30, 1950.

The United States District Court of the
District of Oregon

Civil No. 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

ORDER DENYING MOTIONS AND
DISMISSING CAUSE

On January 3, 1950, came on to be heard the plaintiffs' motions for entry of judgment, or, in the alternative, for entry of summary judgment, or, in the alternative, for leave to file supplemental complaint, the plaintiffs appearing by Thomas H. Tongue, III, of their attorneys, and the defendant appearing by Richard Devers, of its attorneys, and the Court having heard the arguments of counsel, reserved its ruling on the motions and granted the parties additional time to reconsider the Court's opinion rendered herein on December 20, 1946, and to submit memoranda for and against the said motions. The plaintiffs, by Thomas H. Tongue, III, and the firm of Hicks, Davis & Tongue, of their attorneys, having on January 23, 1950, filed a memorandum in support of the said motions, and the defendant, by Richard Devers, of its attorneys, having waived the privilege of submitting a memorandum, the Court having read the plaintiffs' memo-

random and being fully informed in the matter, now makes the following

Findings as to Prosecution of the Case

From the records of this Court, the history of the prosecution of this case appears to be as follows:

I.

The original complaint herein was filed on December 7, 1945.

II.

On December 27, 1945, the defendant filed a motion for an order granting it 20 days' additional time in which to answer or otherwise plead in this action, and on December 27, 1945, the Court entered an order granting the motion.

III.

On January 17, 1946, the defendant filed a motion for an order granting it 30 days' additional time in which to answer or otherwise plead in this action, and on January 17, 1946, the Court entered an order granting the motion.

IV.

On January 21, 1946, the Court set this action for call on February 18, 1946.

V.

On January 30, 1946, the plaintiffs filed their motion, based upon the affidavit of one of the attorneys for the plaintiffs and upon the stipulation

of the parties through their respective attorneys, for an order granting plaintiffs leave to file a supplemental complaint, and on January 30, 1946, the Court entered an order granting the motion, and the supplemental complaint was thereupon filed.

VI.

On February 18, 1946, the defendant filed an answer to plaintiffs' complaint and supplemental complaint herein.

VII.

On February 18, 1946, this action came on before the Court on call. At that time Fletcher Rockwood, of attorneys for defendant, stated that negotiations had been carried on by the attorneys for the parties and that a settlement had been agreed upon subject, however, to the approval of the United States Maritime Commission and the United States Attorney. The Court thereupon informed the attorneys for the parties that any settlement would be subject to the Court's approval, particularly as to attorneys' fees and that testimony on the subject of attorneys' fees would be required.

VIII.

On February 19, 1946, this action was set for call on March 18, 1946, and on that date the Court set the date of March 20, 1946, at 10 o'clock a.m. as the date and hour for the taking of testimony in support of the settlement which had been reached by the parties.

IX.

On March 20, 1946, the Court extended the time for taking testimony in support of the said settlement to March 29, 1946, and on March 29, 1946, on the motion of the plaintiffs, the Court postponed the time for the taking of testimony in support of said settlement to April 19, 1946, and on March 30, 1946, an order to that effect was entered by the Court.

X.

On April 19, 1946, the parties filed the following:

Stipulation for judgment;

Judgment;

Stipulation waiving findings of fact and conclusions of law, notice of entry of judgment, right to motion for new trial, and right of appeal.

On the same date the plaintiffs filed a motion and a stipulation for dismissal of the cause as to James W. Fader and Clinton A. Warriner and the Court entered an order dismissing the cause as to said plaintiffs.

XI.

Hearings in support of said settlement were held in this Court on April 19, 1946, and April 22, 1946. At the hearings a number of the plaintiffs testified, as well as an employee of the defendant, and the United States Attorney for the District of Oregon appeared and participated therein. At the conclusion of the hearings the Court ordered a transcript of the testimony and took the matter under advisement. On April 23, 1946, plaintiffs filed their

exhibits 1 to 10 inclusive and defendant filed its exhibits 11 and 12. Subsequently, on May 13, 1946, the Court called upon the attorneys for the respective parties to appear at which time the Court raised the question of whether in view of the decision of the United States Supreme Court in the case of *D. A. Schulte, Inc. v. Gangi*, 328 U. S. 108, 66 S. Ct. 925, the Court had power to approve the proposed settlement. On motion of the attorneys for the defendant, plaintiffs' attorneys consenting, the Court directed the parties to submit briefs on the question of the validity of the settlement, and granted all interested parties 30 days in which to file their briefs.

XII.

On June 11, 1946, on motion of the defendant and based upon a stipulation of the parties, the Court extended the time to file briefs to June 21, 1946.

XIII.

On June 27, 1946, the plaintiffs filed their memorandum in support of the proposed settlement and on June 24, 1946, on motion of defendant, the Court granted defendant additional time in which to file its brief.

XIV.

On July 8, 1946, the defendant filed its memorandum in support of the proposed settlement.

XV.

On December 20, 1946, the Court rendered a written opinion in which the Court, for the reasons

therein stated, rejected the proposed stipulation, refused to sign and enter the proposed judgment, and ruled that unless other matters were shown, the case would be dismissed.

XVI.

On February 3, 1947, plaintiffs filed interrogatories to be answered by the defendant.

XVII.

On February 14, 1947, pursuant to a stipulation of attorneys for the parties, the Court extended the time in which the defendant might answer or object to plaintiffs' interrogatories to March 18, 1947.

XVIII.

On March 27, 1947, the Court, pursuant to a stipulation of attorneys for the parties, extended the time in which the defendant might answer or object to plaintiffs' interrogatories to April 8, 1947.

XIX.

On April ., 1947, the defendant filed its objections to plaintiffs' interrogatories, and on April 10, 1947, the Court continued the defendant's objections to plaintiffs' interrogatories for future hearing.

XX.

On May 7, 1947, the Court set the defendant's objections to plaintiffs' interrogatories for hearing on May 19, 1947.

XXI.

On May 19, 1947, pursuant to the stipulation of

attorneys for the parties, the Court entered an order withdrawing plaintiffs' interrogatories without prejudice to plaintiffs' right to file further interrogatories.

XXII.

On May 20, 1947, the Court set this cause for call on July 14, 1947, and on the date the Court reset this cause for call on August 4, 1947.

XXIII.

On August 4, 1947, this action came before the Court on call and at that time the defendant stated through its attorneys that it wished to file an amended answer. The Court thereupon set the case for call on September 2, 1947, and on that date the Court allowed the defendant 10 days in which to file its amended answer and reset the case for call on September 12, 1947.

XXIV.

On September 12, 1947, this action came before the Court on call and at that time the Court, pursuant to stipulation of attorneys for the parties, granted the defendant until September 22, 1947, in which to file its amended answer, and an order to that effect was entered on September 13, 1947.

XXV.

On September 22, 1947, the parties through their attorneys filed a stipulation that the defendant might file its amended answer, and on that date the Court entered an order permitting the filing

of such answer, and such answer was thereupon filed.

XXVI.

On October 9, 1947, the Court set this cause for call on October 20, 1947, and on that date the Court set this case for pre-trial conference on November 17, 1947. On November 17, 1947, the pre-trial conference was set over to November 18, 1947, and at said time the Court because of other pre-trial conferences and scheduled jury trials, postponed indefinitely the resetting of a pre-trial conference in this cause.

XXVII.

No action of any kind was taken in this case from November 18, 1947, until November 28, 1949. On June 25, 1947, a companion case pending in this Court entitled C. T. Potter, et al. v. Kaiser Co., Inc., Civil No. 3030, came on for hearing before Honorable Claude McColloch, Judge of this Court, and the defendant herein and therein moved that said Potter case be dismissed pursuant to the provisions of Section 2(a) of the Portal-to-Portal Act of 1947, and said motion was granted orally by Judge McColloch on June 26, 1947, a judgment of dismissal being thereafter entered on January 21, 1948. An appeal was then taken by the plaintiffs in said action to the United States Court of Appeals for the Ninth Circuit, and said appeal was decided by said Court of Appeals on January 10, 1949, the judgment of dismissal being affirmed.

Shortly after the oral decision of Judge McColloch was made granting the motion to dismiss in the Potter case, and when it became certain that

the plaintiffs in said action intended to pursue an appeal to the Court of Appeals from said order of dismissal, it was agreed between counsel for the plaintiffs in the present case and counsel for the defendant in the present case that further proceedings in this case should be suspended until the appeal in the Potter case had been finally determined. The mandate from the Court of Appeals in the Potter case was received by the Clerk of this Court on the 14th day of February, 1949.

On November 28, 1949, the Court set this case for call on December 5, 1949. On that call date the attorney for the plaintiffs in this case stated, in effect, that in view of the enactment of the Portal-to-Portal Act of 1947 and the decision of the Court of Appeals in the Potter case, he wanted an opportunity to determine whether to continue the prosecution of this case. The Court indicated that the case might be dismissed on the Court's own motion for want of prosecution. The Court then reset the case for call on December 12, 1949.

XXVIII.

This cause came before the Court on call on December 12, 1949, and at that time the attorney for the plaintiffs stated that plaintiffs would continue with the prosecution of the case and desired to file a supplemental complaint. The Court thereupon permitted the plaintiffs to tender a supplemental complaint for the Court's consideration.

XXIX.

On December 19, 1949, the plaintiffs filed the

above mentioned motions for entry of judgment or, in the alternative, for entry of summary judgment or, in the alternative, for leave to file a supplemental complaint, together with a supplemental complaint, a memorandum, and an affidavit of one of the attorneys for the plaintiffs in support of the motion.

XXX.

On December 20, 1949, the Court set the above motions for hearing on January 3, 1950, and on that date the matter was heard as hereinabove recited.

Now, Therefore, the Court being fully advised in the premises and being of the opinion that the plaintiffs' said motions are not well taken and should be denied, it is hereby

Ordered that the plaintiffs' motions for the entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint, be and the same hereby are denied.

And the Court being further of the opinion that the plaintiffs have failed to prosecute this action with proper diligence, it is hereby further

Ordered that this action shall be and the same hereby is dismissed for want of prosecution.

Dated July 31, 1950.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Sept. 29, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAINTIFFS-APPELLANT INTEND TO RELY ON APPEAL

Plaintiffs and appellants hereby designate the following points on which they intend to rely on the appeal of the above-entitled cause:

1. The District Court erred in failing and refusing to enter judgment based upon the stipulations of the parties for entry of judgment and the express consent of defendant and of the United States of America for the entry of such judgment.

2. The District Court erred in denying plaintiffs' motions for entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint.

3. The District Court erred in dismissing the action for want of prosecution.

Dated this 2nd day of October, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs
and Appellants.

Service of the foregoing statement of points on which plaintiffs-appellant intend to rely on appeal is hereby accepted this 2nd day of October, 1950.

/s/ RICHARD DEVERS,
Of Attorneys for Defendant-
Respondent.

Copy of above received this 2nd day of October, 1950, but Service not accepted.

/s/ HENRY L. HESS,

United States Attorney for
the District of Oregon.

[Endorsed]: Filed Oct. 2, 1950.

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing in open court and based upon the motion of plaintiffs for an extension of time in which to file the record on appeal in the above-entitled cause, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the time for filing the record on appeal in the above-entitled cause with the Circuit Court of Appeals for the Ninth Circuit shall be and is hereby extended to and including the 16th day of October, 1950.

Dated this 6th day of October, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Oct. 6, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Come now the plaintiffs and appellants herein and, pursuant to Rule 75 of the Federal Rules of Civil Procedure, hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal in the above-entitled cause to be as follows:

Complaint, filed 12/7/45.

Supplemental complaint, filed 1/30/46.

Answer, filed 2/18/46.

Order of dismissal as to James W. Fader and Clinton A. Warriner, filed 4/19/46.

Stipulation re testimony of George Mowry, et al., filed 4/19/46.

Stipulation waiving findings of fact and conclusions of law, notice of entry of judgment, right to motion for new trial and right of appeal, filed 4/19/46.

Stipulation for judgment, filed 4/19/46.

Proposed form of Judgment, filed 4/19/46.

Exhibits: Plaintiffs' 1 to 10, Defendants' 11 and 12, filed 4/23/46.

Transcript of testimony and proceedings on 4/19 and 4/23/46, filed 5/9/46.

Transcript of opinion filed 5/20/46.

Transcript of opinion filed 12/23/46.

Amended Answer, filed 9/22/47.

Order setting case for pre-trial conference, entered 10/27/47.

Any order entered on November 18, 1947, postponing said pre-trial conference indefinitely.

Motion for entry of stipulated judgment or, in the alternative, for entry of summary judgment or for leave to file supplemental complaint, with attached affidavit and Exhibits 1 and 2, filed 12/19/49.

Supplemental Complaint, filed with foregoing motion.

Transcript of proceedings December 12, 1949.

Transcript of proceedings January 3, 1950.

Transcript of proceedings July 3, 1950.

Transcript of proceedings, oral opinion, and oral order of dismissal July 31, 1950.

Notice of Appeal, filed August 30, 1950.

Opinion dated 8/31/50.

Order of dismissal dated July 31, 1950, and filed 9/29/50.

Transcript of Docket Entries.

Statement of points on which appellants intend to rely on appeal.

This designation.

Dated this 2nd day of October, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs
and Appellants.

Service accepted.

/s/ RICHARD DEVERS,
Of Attorneys for Defendant-
Respondent.

Copy of above received this 2nd day of October, 1950, but Service not accepted.

/s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

[Endorsed]: Filed Oct. 2, 1950.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD ON
APPEAL

The appellee, Kaiser Company, Inc., hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal:

Transcript of proceedings on December 5, 1949;
Appellee's designation of additional portions of
Record on Appeal.

/s/ RICHARD DEVERS,
HART, SPENCER, McCULL-
LOCH, ROCKWOOD,
DEVERS,
Of Attorneys for Appellee,
Kaiser Company, Inc.

Copy of above received this 11th day of October, 1950, but Service not accepted.

/s/ EDWARD B. TURNING,
Asst. U. S. Atty.

Service accepted.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 11, 1950.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

The Court: Call Calendar. Civil 3000, Macklin vs. Kaiser.

Mr. Tongue: If the Court please, the Court will recall that case involves a suit against the Kaiser Company in which a settlement was submitted to this Court for approval and the Court finally did not approve the settlement. Following that a similar case involving identical issues, the Potter case, went up from Judge McColloch to the Circuit Court of Appeals and was affirmed by that court. That is, the affirming decision was in favor of the defendants.

I think that quite likely, in view of those facts, the plaintiffs will not desire to press the matter further. However, this case is Mr. Mowry's, with whom we are associated, and although I have discussed the matter with Mr. Mowry I do not have at this time authority so to advise the Court. So I would suggest, if it is agreeable to the Court, that the matter be continued on call for one week, at which time I would hope to have discussed the matter further with Mr. Mowry and be in a position to advise the Court definitely of the plaintiffs' position

as to whether or not plaintiffs will want to continue this matter any further or make any further attempt to prosecute the case.

Mr. Devers: Satisfactory to the defendant.

The Court: All right. Set over until next Monday.

(Whereupon proceedings in the above matter on said day were concluded.)

Reporter's Certificate

I, John S. Beckwith, hereby certify that I am a duly appointed, qualified and acting official court reporter of the above-entitled court; that as such official court reporter I reported in shorthand certain proceedings had on December 5, 1949, in the above-entitled matter, that I subsequently reduced my shorthand notes thereof to typewriting, and that the foregoing transcript, pages 1 and 2, constitute a full, true and accurate transcript of said proceedings so taken by me on said day, and of the whole thereof.

Dated this 13th day of October, 1950.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed Oct. 13, 1950.

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

Dec. 7—Filed complaint.

Dec. 8—Issued summons—to marshal.

Dec. 11—Filed summons.

Dec. 27—Filed motion for additional time to answer.

Dec. 27—Filed and entered order allowing an extension of 20 days to plead. Fee.

1946

Jan. 17—Filed Motion for additional time to answer or otherwise plead.

Jan. 17—Filed and entered order granting additional 30 days to answer. Fee.

Jan. 30—Filed motion for leave to file supplemental complaint.

Jan. 30—Filed stipulation to file supplemental complaint.

Jan. 30—Filed affidavit of Edwin D. Hicks.

Jan. 30—Filed and entered order allowing plaintiff to file supplemental complaint. Fee.

Jan. 30—Filed supplemental complaint.

Feb. 18—Filed answer of deft.

Mar. 30—Entered order setting for hearing on taking of proofs for April 19, 1946. Fee.

Apr. 19—Entered order permitting Gordon Johnson to appear of counsel for defendant pending general admission, record of hearing on application for judgment and order continuing to Apr. 23. Fee.

DOCKET ENTRIES—(Continued)

1946

- Apr. 19—Filed motion to dismiss cause as to James W. Fader and Clinton A. Warriner.
- Apr. 19—Filed stipulation to dismiss cause as to James W. Fader and Clinton A. Warriner.
- Apr. 19—Filed & entered order dismissing cause as to James W. Fader and Clinton A. Warriner. Fee.
- Apr. 19—Filed stipulation re testimony of Geo. Mowry, et al.
- Apr. 19—Filed stipulation waiving findings of fact & conclusions of law, notice of entry of judgment, right to motion for new trial and right of appeal.
- Apr. 19—Filed stipulation for judgment.
- Apr. 23—Record of hearing on application for approval of settlement & for judgment-submitted. Fee.
- Apr. 23—Filed exhibits: Plffs 1 to 10, Defts. 11 & 12.
- May 9—Filed transcript of testimony and proceedings.
- May 13—Record of opinion & order to submit question of validity of settlement on briefs & allowing parties 30 days to file briefs. Fee.
- May 20—Filed transcript of oral opinion May 13, 1946.
- June 11—Entered order allowing to June 21, 1946 file briefs. McC.
- June 24—Entered order allowing deft. further time to file brief. Fee.

DOCKET ENTRIES—(Continued)

1946

- June 27—Filed plaintiffs' memorandum in support of proposed settlement.
- July 8—Filed defendant's brief.
- Dec. 20—Record of opinion.
- Dec. 23—Filed opinion.
- Dec. 26—Filed transcript Dec. 20, 1946.

1947

- Feb. 3—Filed plaintiffs' interrogatories.
- Feb. 14—Filed stipulation for order extending time to answer ptffs interrogatories to March 18.
- Feb. 14—Filed & entered order extending time to answer ptffs interrogatories to March 18. McC.
- Feb. 27—Filed & entered order extending time to answer ptffs interrogatories to April 8, 1947. McC.
- Feb. 27—Filed stipulation for order extending time to answer ptffs interrogatories to April 8, 1947.
- May 17—Entered order allowing plaintiff to withdraw interrogatories. Fee.
- May 19—Filed order allowing plaintiff to withdraw interrogatories. Fee.
- Sept. 2—Entered order allowing defendant 10 days to answer. Fee.
- Sept. 12—Filed stipulation for extension of time.
- Sept. 13—Filed order extending time to file Amended Answer.
- Sept. 22—Filed stipulation for amended answer.

1949

DOCKET ENTRIES—(Continued)

- Sept. 22—Filed & entered order permitting filing of amended answer. Fee.
- Sept. 22—Filed Amended answer to complaint & supplemental complaint.
- Oct. 20—Entered order setting for pre-trial conference Nov. 17, 1947. Fee.
- Dec. 19—Filed pl'tfs' motion for judgment, etc. & affidavit.

1950

- Jan. 3—Record of hearing on motion of plaintiff for entry of judgment or in alternative for leave to file supplemental complaint, entered order continuing to further order on motion of counsel for respective parties. Fee.
- Jan. 23—Filed plaintiffs' memorandum in support of motion for entry of judgment on stipulation.
- July 31—Record of oral opinion. Fee.
- July 31—Entered order dismissing for want of prosecution & all motions denied. Fee.
- Aug. 30—Filed notice of appeal by pl'tfs.
- Aug. 30—Filed bond for costs on appeal.
- Aug. 30—Copies of notice of appeal mailed by appellants to Richard Devers and John R. Brooke.
- Sept. 29—Filed order denying plaintiffs motions for entry of judgment or entry of summary judgment or for leave to file supplemental complaint & dismissing cause for want of prosecution. Fee.

DOCKET ENTRIES—(Continued)

1950

- Oct. 2—Filed reporter's transcript, dated Dec. 12, 1949, Jan. 3, July 3, and July 31, 1950.
- Oct. 2—Filed statement of points.
- Oct. 2—Filed designation of contents of record on appeal.
- Oct. 6—Filed motion for order extending time for filing & docketing appeal.
- Oct. 6—Filed & entered order extending time for filing & docketing appeal to Oct. 16. McC.
- Oct. 6—Filed motion for order to withdraw exhibits to send to U. S. Court Appeals.
- Oct. 6—Filed & entered order to withdraw exhibits to send to U. S. Court Appeals. McC.
- Oct. 11—Filed appellee's designation of additional portions of record on appeal.
- Oct. 13—Filed in duplicate, transcript of proceedings 12/5/1949.
-

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, Supplemental Complaint, Answer, Order dated April 19, 1946, Stipulation, Stipulation waiv-

ing findings of fact and conclusions of law, etc., Stipulation for judgment, Judgment, Opinion dated December 20, 1946, Amended Answer to Complaint and Supplemental Complaint, Order dated October 20, 1947, Motion for entry of judgment, etc., Notice of appeal, Bond for costs on appeal, Order denying motions and dismissing cause, Statement of points on which plaintiffs-appellant intend to rely, Order extending time for filing record on appeal, Order to forward exhibits, Designation of contents of record on appeal, Appellee's designation of additional portions of record on appeal, Transcript of docket entries and this certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 3000, in which L. I. Macklin, et al. are plaintiffs and appellants and Kaiser Company, Inc. is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that I am forwarding under separate cover transcript of testimony and proceedings dated April 19 and 23, 1946, transcript of oral opinion dated May 13, 1946, transcript dated December 20, 1946, transcript of proceedings dated December 12, 1949, January 3, 1950, July 3, 1950, and July 31, 1950, transcript of proceedings dated December 5, 1949, and transcript of proceedings dated June 24-26, 1947, Civil No. 3030 (Exhibit No. 2) together with exhibits 1 to 12 inclusive.

I further certify that the cost of filing notice of

appeal is \$5.00 and that the same has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of October, 1950.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12712. United States Court of Appeals for the Ninth Circuit. L. I. Macklin, et al., Appellants vs. Kaiser Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION RE DESIGNATION OF
RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective undersigned attorneys, that for the purposes of Rule 19, subdivision 6, of the Rules of Practice of the above-entitled Court the entire record, as filed in this Court, and as set forth in the designations of record on appeal filed by both of the parties hereto in the United States District Court for the District of Oregon, shall constitute and shall be designated as the record on appeal in the above-entitled Court and shall be printed under the supervision of the Clerk of said Court, with the following exceptions which are to be omitted:

1. All captions and footings on pleadings, motions, orders, opinions and other documents to the extent deemed to be good practice by the clerk of the above-entitled court.

2. With reference to the complaint, designated as Item 1 of appellant's Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon and which appears as item 1 of the original certified record, paragraphs VI to XXXVII thereof shall be omitted and that in lieu thereof the following shall be printed:

“Paragraphs VI to XXXVII have been omitted in printing and consist of allegations similar to those of paragraph V for the follow-

ing additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
6. Len A. Maple.....	\$559.54	\$559.54	\$170.00
7. George W. Hess.....	207.42	207.42	60.00
8. R. F. Yeo.....	613.28	613.28	180.00
9. Eric E. Sundberg.....	315.31	315.31	90.00
10. J. H. Stone.....	510.97	510.97	150.00
11. W. G. Imus.....	632.21	632.21	190.00
12. C. E. Culver.....	331.88	331.88	100.00
13. A. F. Warrick.....	186.98	186.98	60.00
14. Arthur E. Glennon.....	460.30	460.30	140.00
15. J. J. Knox.....	560.44	560.44	170.00
16. E. R. Johnson.....	397.87	397.87	120.00
17. M. F. Williams.....	579.38	579.38	160.00
18. H. J. Weigel.....	341.44	341.44	100.00
18(2) H. O. Hanson.....	506.41	506.41	150.00
19. Arthur B. Todd.....	191.93	191.93	60.00
20. John T. Holden.....	123.98	123.98	40.00
21. S. M. Rogers.....	224.63	224.63	50.00
22. Daniel J. Chase.....	512.92	512.92	150.00
23. John Popma.....	597.80	597.80	180.00
24. George F. Nickels.....	125.40	125.40	40.00
25. T. W. Craig.....	514.02	514.02	150.00
26. Herbert J. Carlyle.....	64.13	64.13	20.00
27. James O. Bryant.....	94.05	94.05	30.00
28. G. G. Dean.....	85.50	85.50	30.00
29. Clinton A. Warriner.....	128.25	128.25	40.00
30. John L. Hill.....	570.00	570.00	170.00
31. R. J. Penniwell.....	463.41	463.41	140.00
32. J. C. Cronin.....	300.00	300.00	90.00
33. H. E. Carr.....	300.00	300.00	90.00
34. G. O. True.....	300.00	300.00	90.00
35. O. I. Rawls.....	300.00	300.00	90.00
36. W. F. Peddicord.....	300.00	300.00	90.00
37. O. P. Bjornsgaard.....	300.00	300.00	90.00''

3. With reference to the supplemental complaint, designated as Item 2 of appellant's Designation of Contents of Record on Appeal in the United States

District Court for the District of Oregon and which appears as item 2 of the original certified record, paragraphs IV to XX thereof shall be omitted and that in lieu thereof the following shall be printed:

“Paragraphs IV to XX have been omitted in printing and consist of allegations similar to those of paragraph III for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys’ Fees Claimed
4. W. J. Cox.....	\$400.00	\$400.00	\$120.00
5. Claude F. Krigbaum.....	250.00	250.00	75.00
6. I. W. Collier.....	100.00	100.00	30.00
7. John H. Van Hook.....	450.00	450.00	135.00
8. Arthur E. Johnson.....	350.00	350.00	105.00
9. R. I. Nordeide.....	650.00	650.00	195.00
10. Lee Mainard	100.00	100.00	30.00
11. B. L. Cash.....	650.00	650.00	195.00
12. Perry Hunt	150.00	150.00	45.00
13. Charles J. Monrean.....	300.00	300.00	90.00
14. W. T. Taulbee.....	300.00	300.00	90.00
15. George E. Dopp.....	300.00	300.00	90.00
16. Theodore F. Maynard....	300.00	300.00	90.00
17. Marion L. Long.....	300.00	300.00	90.00
18. W. C. Griffin.....	200.00	200.00	80.00
19. James F. Fader.....	50.00	50.00	15.00
20. Charles J. Wilson.....	300.00	300.00	90.00”

4. With reference to the original exhibits designated as Item 9 of appellants’ Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon, all such exhibits shall be printed except as follows:

A. Exhibits 3, 4 and 5 shall be omitted and in lieu thereof the following statements shall be inserted following the printing of Exhibit 1:

“Exhibits 3, 4 and 5 are identical with Exhibit 1 except that they consist of letters to

Alfred F. Warriek, W. F. Peddicord and L. I. Macklin.”

B. Of the letters included in Exhibit 2 only the first letter, addressed to O. I. Rawls shall be printed, followed by the following statement:

“Exhibit 2 also includes identical letters to John H. Van Hook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, George F. Nickels, George W. Hess, Marion M. Long, O. P. Bjornsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson and Richard F. Yeo.”

C. Exhibit 9 shall be omitted and the following designation shall be inserted following the printing of Exhibit 8:

“Exhibit 9 is identical with Exhibit 8 except that it relates to Len A. Maple.”

D. Exhibits 6, 7 and 10 shall be omitted.

5. With reference to the transcript of testimony and proceedings on April 19 and April 23, 1946, referred to as Item 10 of appellee's Designation of

Contents of Record on Appeal in the United States District Court for the District of Oregon the following portions of said transcript shall be omitted and, in lieu thereof, the following statement shall be inserted:

Transcript pages 60 to 80, inclusive and pages 89 to 101, line 21, inclusive, consisting of the testimony of plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg shall be omitted and in lieu thereof the following statement shall be inserted:

“Thereupon plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg gave testimony substantially in accord with the testimony given by plaintiffs Culver and Carr.”

6. Exhibits 1 and 2 attached to the motion for entry of stipulated judgment, etc., designated as Item 16 in appellants' Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon and as item 12 of the original certified record shall not be printed.

It is further stipulated that the portions of the record to be omitted in printing, as aforesaid, shall be and remain as parts of the record of said case and may be referred to by the Court or by either party in briefs or in arguments.

Dated this 3rd day of November, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Appellants.

/s/ RICHARD DEVERS,
Of Attorneys for Appellee.

In the United States Court of Appeals
for the Ninth Circuit

No. 12712

L. I. MACKLIN, et al.,

Appellants,

vs.

KAISER COMPANY, INC.,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL

The points upon which appellants intend to rely on the appeal of the above-entitled cause are as follows:

1. The District Court erred in failing and refusing to enter judgment based upon the stipulations of the parties for entry of judgment and the express consent of defendant and of the United States of America for the entry of such judgment.

2. The District Court erred in denying plaintiffs' motions for entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint.

3. The District Court erred in dismissing the action for want of prosecution.

Dated this 8th day of November, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Appellants.

Service accepted.

/s/ RICHARD DEVERS,
Of Attorneys for Respondent

[Endorsed]: Filed Nov. 9, 1950.

No. 12,712

IN THE

United States
Court of Appeals

For the Ninth Circuit

L. I. MACKLIN, et al.,

Appellants,

vs.

KAISER COMPANY, INC.,

Appellee.

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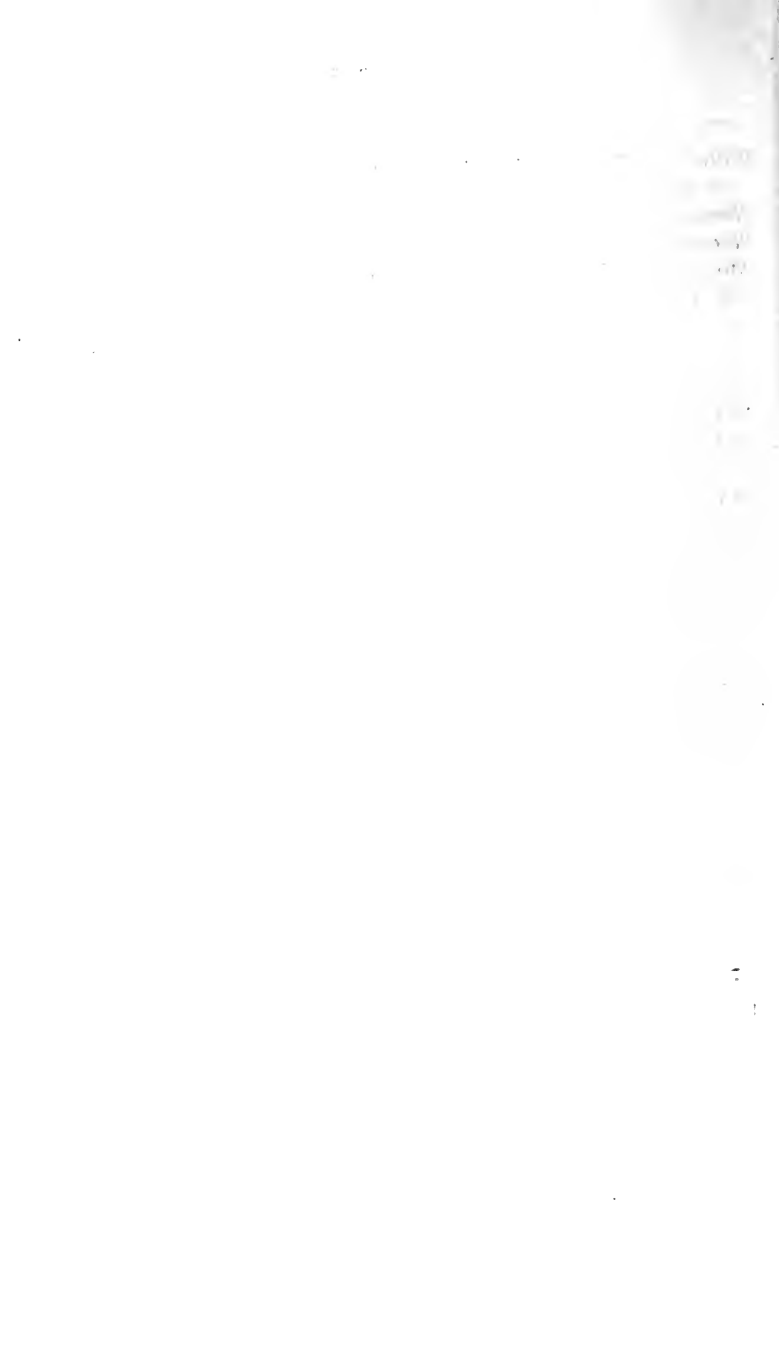
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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

L. I. MACKLIN, et al.,

Appellants,

vs.

KAISER COMPANY, INC.,

Appellee.

Brief for Appellee

INTRODUCTION—THE POSITION OF APPELLEE

A. The Stipulation for Judgment.

By the complaint and first supplemental complaint some 52 guards employed at the Swan Island Yard which Appellee operated for the United States Maritime Commission sought to recover overtime payments and liquidated damages under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201 et seq. Following the institution of the action on December 7, 1945, settlement negotiations were carried on by the attorneys for the parties, resulting in the execution of a Stipulation for Judgment (R. 22-27). This Stipulation for Judgment, accompanied by a proposed form of judgment (R. 27-29), was presented to the trial court on April 19, 1946 (R. 34). Thereafter, at the insist-

ence of the trial court (R. 35-36, 43, 45, 79, 91, 112), evidence was offered in support of the proposed settlement (R. 36-102).

Following an informal presentation thereof on December 20, 1946 (R. 126-129), in an opinion filed on December 23, 1946 (R. 110-125)¹ the trial court refused to enter a judgment pursuant to the stipulation. Three years later, by motion filed December 19, 1949 (R. 143-144), Appellants again requested the trial court to enter a judgment pursuant to the stipulation; but on July 31, 1950, the trial court denied this motion (R. 172).

We refer to these matters by way of introduction to a statement of Appellee's position with respect to the Stipulation for Judgment. Appellee has always taken the position that it entered into that stipulation in good faith and that it is prepared to carry out the terms of such stipulation if the condition thereof, namely, that a judgment be entered pursuant thereto, is accomplished. That such has been the position of Appellee is demonstrated by the following statement of Appellee's counsel in proceedings before the trial court on July 3, 1950, shortly before the action was dismissed:

"Mr. Devers: I might say, your Honor, for the record and for the Court's information also that the defendant entered into a stipulation, which is of record in the case, in good faith and the defendant is willing to abide by the stipulation and has no objection to the entry of judgment in accordance with the stipulation." (R. 171).

What happened in this case is this: because of the state of the law on the question, Appellee was unwilling to settle

¹The opinion is reported in 69 F. Supp. 137.

the case in the usual way, by releases and a dismissal with prejudice. Instead, the settlement stipulation required, and was conditioned upon, the rendition of a judgment. The trial court, refusing to accept the role of a "rubber stamp" (R. 35), declined to render the judgment pursuant to the stipulation. Thus, the condition precedent to the accomplishment of the settlement has not been fulfilled. The issue here, therefore, is not whether Appellee has failed to keep its bargain; rather, the issue is whether the trial court was obligated, as Appellants contend, to enter a judgment pursuant to the stipulation of the parties.

The question is whether the trial court was stripped of its power to act as a judicial officer and its right to exercise sound judicial discretion merely because of the stipulation for judgment. In this state of the record, Appellee's duty to this Court is to point out why the trial court was justified in taking the position it did.

B. The Dismissal for Want of Prosecution.

With respect to the issue of want of prosecution, it should be noted that Appellee did not move for dismissal on that ground (R. 166). Again, however, we believe it to be the function of counsel for Appellee to call to this Court's attention the reasons which demonstrate that the action of the trial court in dismissing the case for want of prosecution was within the sound discretion of that court.

C. The Order of Presentation.

In the presentation of their points of appeal, Appellants have first presented the point that the trial court erred, on December 20, 1946 and on July 31, 1950, in refusing to enter judgment pursuant to the stipulation. They then discuss

the court's refusal to enter a summary judgment or to permit the filing of a supplemental complaint. Finally, Appellants contend that the trial court erred in dismissing the action for want of prosecution. While an orderly presentation of these points might indicate the advisability of our first discussing the dismissal for want of prosecution, the facts and circumstances involved in the other points afford a background for the lack of prosecution point and therefore we shall make our presentation in the same order as that adopted by Appellants.

STATEMENT OF BASIS OF ORIGINAL AND APPELLATE JURISDICTION

This is an appeal from an order of the United States District Court for the District of Oregon, dated and entered July 31, 1950,² dismissing³ this action for want of prosecution (R. 176-185, 196). Notice of Appeal was filed on August 30, 1950 (R. 174-175).

The jurisdiction of the District Court over the complaint and the supplemental complaint, filed January 30, 1946, was invoked under the Fair Labor Standards Act (herein referred to as the F.L.S.A. and the Act), 29 U.S.C.A., Section 216(b) (R. 2-3, 10). The complaint cites Sections 24(1)

²Appellants describe the order merely as so dated and "filed September 29, 1950" (Brief p. 2). Their appeal would be premature were that also the date of entry. However, the Docket Entries disclose the order was *entered* July 31, 1950, and filed September 29, 1950 (R. 196). Fed. Rules Civ. Proc., Rules 58 and 79(a).

³Appellants describe the order as one "purporting to dismiss" the action (Brief p. 2). The order, of course, did dismiss the action and is an appealable order. *Compare* J. E. Haddock, Ltd. v. Pillsbury, 155 F.2d 820 (C.C.A. 9th 1946), cert. denied 329 U.S. 719 *with* Priekett v. Consolidated Liquidating Corp., 180 F.2d 8 (C.A. 9th 1950).

and (8) of the Judicial Code (28 U.S.C.A., Section 41; now 28 U.S.C.A., Section 1332), but contains no allegations supporting jurisdiction based on diversity of citizenship. On December 19, 1949, a second supplemental complaint was tendered, with a motion for leave to file the same, alleging jurisdiction to be based on Rule 15(d), Federal Rules of Civil Procedure; on Section 3(a) and (d) of the Portal-to-Portal Act of 1947 (29 U.S.C.A., Section 253(a) and (d)); and on diversity of citizenship (R. 157). As noted at pages 38, 39-40 of this brief, Appellee contends that the trial court was without jurisdiction over this proposed supplemental complaint.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C.A., Sections 1291 and 1294.

STATEMENT OF THE CASE

The statement of the case contained at pages 2 to 11 of Appellants' brief is acceptable to Appellee, subject to the following comments:

1. At page 3 it is stated that Appellee offered testimony that written instructions had been issued requiring the guards to be present half-an-hour before their regular work began. While it is true that such evidence was offered, it should also be noted that it was qualified by the statement that in actual practice this requirement was never enforced, that roll call time gradually became later and later, and if a man was late he was not penalized (R. 40).

2. At pages 3 and 4 it is stated that Appellee stipulated that its operations were subject to the Act. While Appellee so stipulated, it should be further noted that the material question is whether the activities of Appellants were subject to the Act.

3. At page 6 it is stated that on January 21, 1948, a companion case, known as *Potter v. Kaiser Company, Inc.*, was dismissed and an appeal taken from the dismissal to this Court.⁴ Then it is said that shortly after such dismissal the parties to the present case "agreed to suspend further proceedings until the *Potter* case was decided on appeal" and that this Court's mandate affirming the dismissal was not received until February 14, 1949. These facts are intended to explain a delay of approximately thirteen months, but it should be noted that the record does not disclose that the agreement of the parties with respect to such delay was called to the attention of the trial court at the time of the agreement. The first that the trial court knew of the arrangement was when it was referred to in an affidavit of Appellants' counsel filed on December 19, 1949 (R. 153, 156).

4. On page 9 Appellants refer to the proceedings before the trial court on January 3, 1950, at which, after Appellee's attorney had stated that Appellee did not request that the action be dismissed for want of prosecution, the trial court said:

"I *think*⁵ that in view of that situation the court will not dismiss the case on its own motion." (R. 166).

Then, at page 10, Appellants say that the question of dismissal for want of prosecution was "set at rest by his ruling of January 3 quoted above." It is obvious that the statement of the court was not a ruling, but simply the expression of a tentative and informal view.

⁴This Court's opinion of January 10, 1949, affirming the judgment of dismissal in the *Potter* case is reported in 171 F.2d 705.

⁵In this brief, emphasis is ours unless otherwise indicated.

5. At page 11 Appellants state that, to the complete surprise of everyone concerned, the trial court on July 31, 1950, dismissed the action for want of prosecution. This reference to surprise is argumentative and not borne out by the record, which establishes that the possibility of a dismissal on the ground of want of prosecution was raised by the court as early as December 12, 1949 (R. 161-164).

6. Appellants refer to the proceedings of May 13, 1946, at which time the trial court raised the question as to whether a settlement of the present action was proper in view of the Supreme Court's decision in *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946). The impression is left that this decision was the principal factor troubling the trial court. However, the trial court's opinion of December 20, 1946 (R. 110-125) lists some eight major points (R. 116-117), which may be summarized as follows: (a) whether Appellee was engaged in the production of goods for commerce; (b) whether Appellants were so engaged, either directly or indirectly, when guarding the main installations of the shipyard; (c) whether Appellants were so engaged when guarding installations indirectly connected with ship construction; (d) whether Appellants should be entitled to compromise their claims, whether affecting coverage or not; (e) whether Appellee, when engaged in the production of ships under a cost-plus-fee contract with the Government, came within the purview of the F.L.S.A.; (f) whether the Maritime Commission could administratively adjudicate the rights asserted, agree to pay the same, and have a judicial decree entered enforcing the determination; (g) whether the United States could be rendered liable for overtime pay under the F.L.S.A.; and (h) whether the United States could be rendered liable, by stipulation or

judgment, for liquidated damages imposed on a private employer for failure to comply with the F.L.S.A. These issues are ably summarized and considered by the trial court in its opinion (R. 110-125). It was because of these issues and because of the other considerations stated in that opinion, rather than simply because of the Supreme Court decision in the *Schulte* case, that the trial court refused to enter judgment pursuant to the stipulation of the parties.

ARGUMENT

- I. The District Court Did Not Err in Refusing to Enter Judgment Based Upon the Stipulation of the Parties for Entry of Judgment.**
- A. COURTS FAVOR THE TERMINATION BY SETTLEMENT OF LEGAL CONTROVERSIES BUT THEY DO NOT ABDICATE ALL JUDICIAL FUNCTIONS AT THE INSTANCE OF THE PARTIES.**
- 1. The Rules Stated and Cases Cited by Appellants Support the Broad Doctrine That Courts Favor Settlements of Legal Controversies.**

Appellants first cite the general rule, and some of its corollaries, that the compromise of a disputed claim supports an enforceable contract of settlement (Brief pp. 13-17). The rule is sound but not involved in this case.

Appellants next cite the general rule that stipulations of fact are binding on the court and obviate the requirement of proof thereof (Brief pp. 17-20). The rule is not a sweeping one: evidentiary facts may be stipulated, *Platt v. United States*, 163 F.2d 165 (C.C.A. 10th 1947), but not the legal conclusions drawn therefrom, *Swift & Co. v. Hocking Valley Ry.*, 243 U.S. 281, 289 (1917); *Hackfeld & Co. v. United States*, 197 U.S. 442, 446 (1905) (as quoted in Appellants' Brief, p. 18). A trial court may admit additional evidence proper for a full understanding of issues and for clarifica-

tion of terms used in the stipulation. *Southern California Freight Lines v. Davis*, 167 F.2d 708 (C.C.A. 9th 1948). This general rule cited by Appellants is not directly involved in this case.

Appellants then cite the general rule that "the parties to a pending case may stipulate to the entry of judgment and may agree upon any legal disposition of a case and it is then the *duty* of the court to enter judgment accordingly." (Brief pp. 20-24). With this rule we are here concerned.

Thus, no relevant issue is raised by pp. 12-20 of Appellants' Brief, for we do not quarrel with the general proposition that it is the policy of the law to encourage settlements, or with the rule that generally a settlement will be upheld even though the court believes that a different result would have been attained by a trial on the merits; and we do not challenge the rule, when properly limited, that stipulations of fact are normally binding on the court. But we do take issue, and strenuously so, with Appellants' assertion that a stipulation by the parties for entry of judgment imposes a *duty* on the court to act pursuant to the stipulation. We insist that the parties to an action cannot convert a trial judge from a judicial officer into a rubber stamp.

2. The Entry of a Judgment Pursuant to the Stipulation of the Parties Is a Judicial Function and Calls for the Exercise of Judicial Discretion.

It should be noted preliminarily that a consent decree is a judicial act. "It is a judicial function and an exercise of judicial power to render judgment on consent." *Pope v. United States*, 323 U.S. 1, 12 (1944). "A consent judgment is not a mere authentication or recording of an agreement between the parties * * *" *Urbino v. Porto Rico Ry.*

Light & Power Co., 68 F. Supp. 841, 842 (D.P.R. 1946), *affirmed*, 164 F.2d 12. A consent decree is not treated as a contract but as a judicial act. *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Fleming v. Huebsch Laundry Corp.*, 159 F.2d 581 (C.C.A. 7th 1947).

Appellants contend that the court below had the power *and duty* to enter judgment as stipulated. They cite as error the court's insistence that a basis satisfactory to the court be established for the judgment as a condition precedent to its entry. They cite as error the court's refusal to enter the judgment despite the determination that this basis did not in fact exist.

Apparently Appellants were unaware then, and are still unaware now, that a court need not, and indeed will not, abdicate its functions as a court merely because the parties have stipulated for the entry of a judgment. *West v. Bank of Commerce & Trusts*, 167 F.2d 664, 666 (C.C.A. 4th 1948); *Hot Springs Coal Co. v. Miller*, 107 F.2d 677, 681 (C.C.A. 10th 1939); *Automobile Insurance Co. v. United States*, 10 F.R.D. 489 (D. Ore. 1950); *Rogan v. Essex County News Co., Inc.*, 65 F. Supp. 82 (D.N.J. 1946); *United States v. Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942) (opinion by Maris, C. J.), *appeal dismissed*, 318 U.S. 796; *McLeod v. Hyman*, 272 Pa. 582, 586, 116 Atl. 535, 536 (1922); *Everett v. Cutler Mills*, 52 R.I. 330, 160 Atl. 924 (1932); Cf: *Kidd v. McMillan*, 21 Ala. 325 (1852) (Court not bound by stipulation to retry case after judgment); *Merrill v. Batchelder*, 123 Cal. 674, 56 Pac. 618 (1899) and *Everett v. Cutler Mills*, *supra* (stipulation for entry of judgment is merely evidence to be considered by trial court in rendering decision).

There are factors which a court will, even in an ordinary case, consider prior to rendering a consent decree. The consideration of certain of these factors may be discretionary, but that of others is mandatory. Hence the *duty* of the court is not to ignore them; on the contrary, it has the power and, under certain circumstances, the duty to require proof thereof. Thus:

(1) Fundamentally the court must have jurisdiction over the subject matter. This proposition hardly needs authority in support, but the same authority relied on by Appellants (Brief p. 20) states it as follows:

"It is essential that * * * the subject matter be within the jurisdiction of the court. While the parties by their consent may confer jurisdiction over their persons, they cannot do this as to the subject matter."

3 Freeman on Judgments (5th Ed. 1925) p. 2772.

In *Walling v. Miller*, 138 F.2d 629, 631 (C.C.A. 8th 1943), *cert. denied*, 321 U.S. 784, the court said:

"On the other hand, if the court lacks power to adjudicate such a cause of action in the first instance, it lacks power also to sanction a stipulation of settlement by entering a consent decree."

(2) The court may inquire into the existence and validity of the agreement, and the power or authority of the parties to execute the agreement. *Kelley v. Milan*, 127 U.S. 139 (1888) (mayor lacked power to enter stipulation on behalf of city); *West v. Bank of Commerce & Trusts*, *supra*, p. 10, (city attorney lacked power to enter stipulation); 3 Freeman on Judgments (5th Ed. 1925) section 1344 (a personal representative may have to obtain judicial approval), 1346 (in certain jurisdictions, e.g., North Carolina, express au-

thority is needed), and 1349 (a hearing may be required to establish the fact or validity of the agreement). *See: Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) (consent decrees are subject to review on appeal on claim of lack of consent).

(3) There frequently arise cases wherein the court will inquire whether or not the settlement is fair and equitable, e.g., when a party is a minor, *Glover v. Bradley*, 233 Fed. 721 (C.C.A. 4th 1916); in suits in equity, *Hot Springs Coal Co. v. Miller*, *supra*, p. 10;⁶ and in cases where the public interest is involved, *West v. Bank of Commerce & Trusts*, *supra*, p. 10; *Rogan v. Essex County News Co., Inc.*, *supra*, p. 10; *United States v. Radio Corporation of America*, *supra*, p. 10.

(4) And, of course, the agreement must be free of fraud. *Swift & Co. v. United States*, *supra*.

It is plain from the foregoing that when a stipulation for entry of judgment is presented to a trial court by the parties, the court is called on to do more than act as a robot or a rubber stamp. The court remains a judicial officer and cannot, by mere act of the parties, be divested of its judicial functions and its duty to exercise judicial discretion. That this is particularly so with respect to F.L.S.A. cases will be shown in the following portions of this brief.

⁶The court, in sustaining the validity of a decree quieting title to real property entered on a stipulation, said, at p. 681 of 107 F.2d: "It was submitted to the court for its approval, which approval was within the equitable powers of the court to grant if it found the agreement equitable. This the court did."

B. UNITED STATES DISTRICT COURTS COULD, PRIOR TO THE ENACTMENT OF THE PORTAL-TO-PORTAL ACT, REFUSE TO ENTER JUDGMENTS ON STIPULATION IN ACTIONS ARISING UNDER THE FAIR LABOR STANDARDS ACT.

In this section of the brief we direct attention solely to the ruling on December 20, 1946 of the District Court in refusing to sanction the stipulation for entry of judgment. At that time the Portal-to-Portal Act of 1947, 29 U.S.C.A. §§ 251 et seq., had not been enacted. We reserve for later discussion the effect of that enactment.

We need but briefly advert to a matter of which Appellants make great moment. They cite the statement made by the court below in its opinion of December 20, 1946 that "The court has jurisdiction to dismiss the action even though the reasons for so doing may be utterly inadequate." (R. 115; Brief p. 25). They attack the citation of *Haggard v. Pelicier Frères* [1892] A.C. 61, because, although in point, the case did not pass on the *merits* of the dismissal. Then they make the bold assertion that the court must have meant that it could act arbitrarily, leaving the parties with "no recourse whatever." This is absurd. The court was speaking of its *power* to dismiss and not of the propriety of its ruling. Lack of power is one thing; an improper ruling quite another. *Cf. Walling v. Miller, supra*, p. 11. The former may be attacked collaterally; the latter only directly. Appellants are now having "recourse" in this very appeal.

We come now to those factors differentiating an F.L.S.A. claim in federal courts from the "usual" civil case.

1. United States District Courts Are of Limited and Statutory Jurisdiction Requiring Parties Affirmatively to Establish and Maintain Jurisdiction.

The federal courts, with the exception of the Supreme Court, are not courts of general jurisdiction. Their jurisdiction is limited and entirely statutory, since it derives not directly from the Constitution but wholly from the authority of Congress. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Fisch v. General Motors Corp.*, 169 F.2d 266, 272 (C.C.A. 6th 1948), *cert. denied*, 335 U.S. 902. “* * * The presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears from the record.” *Börs v. Preston*, 111 U.S. 252, 255 (1884); *United States v. Green*, 107 F.2d 19, 22 (C.C.A. 9th 1939). Hence, the burden rests on the plaintiff to have the record affirmatively show the existence of jurisdiction. *Smith v. McCullough*, 270 U.S. 456 (1926); *Börs v. Preston*, *supra*. Obviously then, the consent of the parties cannot create jurisdiction in the courts of the United States. *See: Pacific R.R. v. Ketchum*, 101 U.S. 289, 298 (1879).

A district court therefore has the power *and is under a duty* to determine its jurisdiction even when not called to its attention by the parties. Lacking jurisdiction over the subject matter, the court lacks the power to enter a consent judgment in that action. *Walling v. Miller*, *supra*, p. 11.

2. All Rights Created Under the Fair Labor Standards Act Are Vested with Public Interest.

The rights created by the F.L.S.A., whether statutory or contractual, are not purely private affairs but have a “private-public character” and are “charged or colored with the public interest.” *D. A. Schulte, Inc. v. Gangi*, 328 U.S.

108 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *United States v. Darby*, 312 U.S. 100 (1941); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (C.C.A. 2d 1948), *cert. denied*, 335 U.S. 887; *Darr v. Mutual Life Ins. Co.*, 72 F. Supp. 752 (D.S.D.N.Y. 1947), *aff'd*, 169 F.2d 262, *cert. denied*, 335 U.S. 871.

It follows, then, that the courts have the power to question the fairness of a proposed settlement and to refuse to sanction a stipulated judgment that is not fair and equitable. *Rogan v. Essex County News Co., Inc.*, *supra*, p. 10.; *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960 (C.C.A. 5th 1947) (by implication).

3. Prior to the Enactment of the Portal-to-Portal Act, the Validity of Any Compromise of a Claim Arising Under the Fair Labor Standards Act Was Generally in Doubt.

The authority on which Congress relied to enact the Fair Labor Standards Act was its power to regulate interstate commerce. The purpose, however, was to create a statutory scheme to protect certain segments of the population from substandard wages and excessive hours of employment. This scheme was to be uniform throughout the nation and was not to be contravened by contract or custom depriving employees of the statutory rights assured by the Act. *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161 (1945).

It is not surprising, then, to find the Supreme Court ruling that a compromise agreement settling a claim arising under the Act in the absence of a bona fide dispute was not a bar to an action for liquidated damages. *Brooklyn Savings Bank v. O'Neil*, *supra*. In that case the Supreme

Court expressly refused to pass on the validity of a compromise agreement where a bona fide dispute did exist.

A year later, the latter question was before the court and it held that, despite the existence of a bona fide dispute, a compromise agreement settling a dispute over *coverage* was not a bar to a subsequent action for liquidated damages. *D. A. Schulte, Inc. v. Gangi, supra*, p. 14. And here, at page 114 of 328 U.S., the court said:

“Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment.”

Appellants cite this language (Brief p. 44) as giving “implicit approval” of compromises of disputes over the number of hours worked. If anything, it was an amber signal heralding an approaching red light whenever the question should arise, just as the question expressly left open in the *O’Neil* case was, to the extent it arose in the *Gangi* case, decided adversely to the general tenor of the contentions of Appellants.

It is, therefore, clear that in 1946—whether it be April, when the stipulation was presented, or whether it be December, when the court below rejected the stipulation—compromises in the absence of a bona fide dispute and compromises of a bona fide dispute over coverage were invalid, and that any other compromise of any of these statutory rights was, at the very least, suspect.

Mr. Justice Jackson, concurring in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 154, 155 (1947) put it in this fashion:

“This Court has foreclosed every means by which any claim, however dubious, under this statute or

under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697; cf. *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp. v. United Mine Workers*, 325 U.S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions."

4. Consent Judgments in Actions to Enforce Claims Arising Under the Fair Labor Standards Act Required "Judicial Scrutiny" Before Entry.

We have seen that judicial interpretation, resting on declared legislative policy, proscribed many, if not all, compromise agreements resulting from private bargaining. Consent judgments, *when sanctioned by a court*, stood on a somewhat different footing. In *North Shore Corp. v. Barnett*, 323 U.S. 679 (1944), the court did approve a stipulation for the entry of a consent judgment for a sum equal to two-thirds of the amounts awarded by the District Court. It should be noted, however, that there had been a full and complete trial on the merits, 52 F. Supp. 503, and an affirmance by the Circuit Court of Appeals of a judgment awarding overtime compensation, liquidated damages, and attorney fees, 143 F.2d 172, *before* the consent judgment was tendered and approved.

That case was called to the attention of the Supreme Court during its deliberations in *D. A. Schulte, Inc. v. Gangi, supra*, p. 14. The court dealt with it only in passing, by way of footnote. The highly illuminating portion thereof discussing consent judgments is as follows:

“* * * Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. *North Shore Corp. v. Barnett*, 323 U.S. 679.

“Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, *we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny MAY differentiate stipulated judgments from compromises by the parties*. At any rate, the suggestion of petitioner is argumentative only as no judgment was entered in this case.” Footnote 8 at page 114 of 328 U.S.

In *Rogan v. Essex County News Co., Inc., supra*, p. 10, the District Court refused to enter judgment on stipulation in an action arising under the Fair Labor Standards Act, saying:

“The proposed judgment is significantly not supported by either proof or a stipulation of facts * * * the District Court should deny its authoritative approval of private settlements except upon a clear showing that the statutory requirements have been met. It is be-

cause of the complete absence of such a showing that we must refuse to enter the proposed final judgment." Page 83 of 65 F. Supp.

The court below took the same action in the present case. It was proper.

In *Urbino v. Puerto Rico Ry. Light & Power Co.*, 164 F.2d 12, 14 (C.C.A. 1st 1947), the court held that a consent judgment was a bar to a subsequent action for liquidated damages because the settlement "receives the judicial approval implicit in the entry of a consent judgment."

Therefore, when the court below had before it the stipulation of the parties for entry of judgment, it not only had the power, but the duty, to exercise its judicial functions and its discretion as a condition precedent to the entry of the judgment. Indeed, it has been held, despite the general rule that a consent judgment is similar in its effect to any other kind of judgment, that "A judgment, not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right." *Trapp v. United States*, 177 F.2d 1, 5 (C.A. 10th 1949), cert. denied, 339 U.S. 913; *Fruehauf Trailer Co. v. Gilmore*, 167 F.2d 324 (C.C.A. 10th 1948). Cf.: *Assmann v. Fleming*, 159 F.2d 332 (C.C.A. 8th 1947); *Jarrard v. Southeastern Shipbuilding Corp.*, supra, p. 15; *Urbino v. Puerto Rico Ry. Light & Power Co.*, supra.

It should be apparent now why Appellee did not at any time retreat from its position that any payments to be made on the claims of Appellants were conditioned on the entry of a judgment of the court. As the law then existed, any-

thing short of that would not have laid these claims to rest. Employers are entitled to a measure of protection as well. *Cf: Bracey v. Luray*, 161 F.2d 128 (C.C.A. 4th 1947), *cert. denied*, 332 U.S. 790.

5. There Are Close Analogies Supporting the Power of United States District Courts to Refuse to Enter Judgments on Stipulation in Actions Arising Under the Fair Labor Standards Act.

In *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), the question presented was the coverage under the Act of employees working for a munitions manufacturer under a "cost-plus-a-fixed fee" contract with the United States. The Supreme Court refused to determine the issue because the record, based on a summary judgment on the pleadings and affidavits, lacked a determination by the trial court of factual issues. In remanding the cause, the following most pertinent language was used:

At page 256:

"The short of the matter is that we have an extremely important question, probably affecting all cost-plus-a-fixed fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation."

And at page 257:

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

In *Waialua Agriculture Co. v. Maneja*, 178 F.2d 603 (C.A. 9th 1949), *cert. denied*, 339 U.S. 920, this Court re-

fused to affirm a declaratory judgment in an action brought to determine the non-coverage under the Act of certain employees, for the reason, among others, that judgment was not founded on fact.

A more distant analogy is found in the Anti-Trust Laws, which differentiate between "final judgments" and those entered on consent with respect to their use as prima facie evidence, as follows:

"* * * This section shall not apply to consent judgments or decrees entered before any testimony has been taken." 15 U.S.C.A. Section 16.

When the present case is boiled down to fundamentals, we see that the trial judge, on presentation of the stipulation for entry of judgment on April 19, 1946, said:

"I think in a public thing of this sort that it is my idea at this time that there be some proof submitted to support the judgment. I am not going to simply rubber stamp somebody's findings in these things." (R. 35).

In his opinion of December 20, 1946, refusing to enter judgment pursuant to the stipulation, the trial judge said, *inter alia*:

"Likewise, the court has jurisdiction to refuse to enter judgment upon a stipulation which does not set out facts." (R. 115)

Although the words are different, the thoughts are practically identical with those expressed several years later by the Supreme Court in *Kennedy v. Silas Mason Co.*, *supra*, p. 20, when it said that a conclusion in an important case should not "prudently be rested on an indefinite factual foundation" and that "good judicial administra-

tion" dictated that a decision be withheld until the court was presented with "a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." In arriving at their respective conclusions both the supreme Court in the *Silas Mason* case and the trial court in the present case performed their duties, functioned as judicial officers, exercised discretion. To do so is not error.

C. THE DISTRICT COURT DID NOT ERR WHEN, ON DECEMBER 20, 1946, IT REFUSED TO ENTER THE JUDGMENT AS STIPULATED.

We have thus far shown that in any action brought in the federal courts to enforce a claim arising under the Fair Labor Standards Act wherein a stipulation for entry of judgment on consent is filed, the court has the right—and the duty—to establish that the court has jurisdiction, that there in fact exists a cause of action, and that the judgment is in the public interest. The court below exercised that right and duty, and concluded that the judgment should not be entered. That such conclusion was correct is shown by the following specific consideration of the record.

1. Entry of Judgment Was Properly Refused Because the Jurisdiction of the Court Was Not Adequately Established.

Appellants apparently make some claim that jurisdiction is founded in part on diversity (R. 2-3; Brief p. 2). A FLSA claim need not rest on diversity. If it did, Appellants have utterly failed to establish it. The complaint contains an allegation that defendant is a Nevada corporation (R. 3). The complaint is devoid of any allegations of the citizenship of the Appellants. The record is devoid of any proof of the citizenship of the Appellants. It is consistent, then, that some, if not all, of the Appellants are citizens of Nevada. Therefore, diversity jurisdiction does not exist on

this record. 28 U.S.C.A., Section 1332; *Börs v. Preston, supra*, p. 14.

Furthermore, none of the claims asserted by any of the Appellants meets the jurisdictional amount of \$3,000. 28 U.S.C.A. Section 1332. The claim of each Appellant is separate and distinct. The claims therefore are not aggregated when determining the jurisdictional amount. *Pinel v. Pinel*, 240 U.S. 594 (1916); *Fisch v. General Motors Corp., supra*, p. 14.

Diversity jurisdiction cannot be established merely by citing the statute which creates it.

It may be argued that the *allegations* in the complaint (R. 2) are sufficient to show coverage under the Act. However, the trial judge was not satisfied with the stipulation insofar as it related (or failed to relate) to the question of coverage. The court commented extensively on this subject in its opinion (see R. 113-116) and in that connection said (R. 115):

“The court is still impressed with the position that even in private litigation the plaintiffs, or others in their situation, would not be permitted simply to enter a compromise judgment *upon a stipulation which did not set up facts showing their coverage. This stipulation is devoid of any agreement as to such facts.*”

In its catalogue of questions of fact and principles of law arising from the stipulation, the court listed (a) the question as to whether Appellee was engaged in the production of goods for commerce (b) the question as to whether Appellants were so engaged while guarding the main installations of the shipyard and (c) the question whether Appellants were so engaged while guarding other installations only indirectly connected with construction (R. 116). All

of these questions relate to coverage under the Act. They involved the jurisdiction of the court, and it had the right to go into the question of its jurisdiction.

The fact that Appellee was operating under a cost-plus-a-fixed-fee contract with the United States raised serious doubts as to whether the claims of Appellants were cognizable under the Act. The contentions variously made in similar cases were that the employer was an agent of the United States, that the employees were not "engaged in the production of goods for commerce," that neither the employees nor the employer was "engaged in commerce," that the munitions or ships were not "goods" within the meaning of the Act, and that the claims were cognizable only under the Walsh-Healey Act. *United States Cartridge Co. v. Powell*, 174 F.2d 718 (C.A. 5th *en banc* 1949), *rev'd.*, 339 U.S. 497 (1950); *St. Johns River Shipbuilding Co. v. Adams*, 164 F.2d 1012 (C.C.A. 5th *en banc* 1947); *Kennedy v. Silas Mason Co.*, 164 F.2d 1016 (C.C.A. 5th *en banc* 1947), *rev'd. on other grounds*, 334 U.S. 249 (1948);⁷ *Kruger v. Los Angeles Shipbuilding & Drydock Corp.*, 74 F. Supp. 595 (D.S.D. Cal. 1947); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn. 1947), *aff'd sub nom Brenna v. Federal Cartridge Corp.*, 174 F.2d 732 (1949), *and rev'd.*, 183 F.2d 414; *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (D.E.D. Ark. 1947); *Love v. Silas Mason Co.*, 66 F. Supp. 753 (D.W.D. La. 1946). There are decisions holding such employees covered (cases collected, footnote 5, p. 723 of 174 F.2d, *supra*). In these cases, the decision frequently turned on the terms of the particular contract (the contract was not before the court below, R. 127), or

⁷See discussion at page 253 of 334 U.S.

on the nature of the goods being produced, or on their ultimate intended use. The posture of this case has never been such that these matters could be ascertained.

Appellants refer to the Supreme Court ruling in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), *supra*, p. 24. That decision, for the first time, was a definitive answer on this aspect of the coverage question. It was rendered on May 8, 1950. The action of the court below was taken on December 20, 1946. That action was not erroneous, save under the clearer view always afforded by hindsight. We reserve for discussion in Part II of this brief the effect of the Supreme Court decision in the *Powell* case on the District Court's ruling on Appellants' Motion for Entry of Judgment filed December 19, 1949, and denied July 31, 1950.

2. Entry of Judgment Was Properly Refused Because the Existence of a Claim Was Not Adequately Established.

In addition to failing to establish *the facts* showing coverage as to each Appellant, the Appellants failed to show as to each of them that thirty minutes' preliminary work was performed in response to the roll call requirements. While it is true that, as Appellants point out (Brief p. 3), testimony relative to written instructions requiring Appellants to report for roll call one-half hour early was offered by Appellee, the same witness at that time testified as follows:

“* * * However, from an actual practice that particular rule was never enforced. The roll call time gradually got later and later, and if a man was late he wasn't penalized, or anything of that nature, for coming in late.” (R. 40).

This witness also testified that the actual time reported in advance varied from a few minutes to a maximum of thirty minutes (R. 41). Counsel for Appellants informed the court, on April 23, 1946, that Appellant Maple had the day previously informed him that during part of the time involved the Appellants were "on duty" only twenty minutes (R. 52). Those Appellants who did testify said it was a full thirty minute period (R. 79, 82, 83). At best this creates a conflict of testimony (R. 112). When rejected by the trial court, it does not constitute a factual basis for the existence of a valid claim. A settlement based on the compromise of a claim known to be invalid is not enforceable. *See: McPike v. Superior Court*, 220 Cal. 254, 259, 30 P.2d 17, 19 (1934).

**3. Entry of Judgment Was Properly Refused Because
the Judgment Was Not in the Public Interest.**

We have seen that the Fair Labor Standards Act is of a "public-private" nature, so that the claims arising thereunder are vested with a public interest (*supra*, pp. 14-15).

Facts supporting coverage were never introduced to the satisfaction of the court below (R. 115). The compromise of a bona fide dispute over coverage settled by private bargaining had been declared invalid. *D. A. Schulte, Inc. v. Gangi, supra*, p. 14. The validity of compromises of purely factual disputes involving the number of hours' work was expressly not passed on in that case. Consent judgments were likewise left in a state of doubt. See discussion herein, *supra* at pages 15-20. In view of the law then existing, the refusal to sanction a settlement if it involved in part a compromise of coverage was not error. *Rogan v. Essex County News Co., Inc., supra*, p. 10.

Furthermore, the formula for settlement was determined for the entire group of claimants and applied in wholesale manner (R. 38-42). A comparison of the demands made by Appellants (R. 7-8, 11) with the amounts stipulated to be due (R. 25-27) discloses that 24 of the latter amounts were *less than* the claims asserted, despite the fact that the settlement purported to be a compromise of claims for both over-time compensation and liquidated damages. On such a record the court below was justified in refusing to accept the stipulation and in requiring a trial on the merits.

Furthermore, the public-interest of the present litigation was accentuated by the fact that the ultimate burden of the judgment would rest on the United States by virtue of its contract with Appellee. The court below cited *Love v. Silas Mason Co.*, *supra*, p. 24 (and we have seen that it did not stand alone) as further support of its duty carefully to scrutinize the settlement presented for approval. The court below did not err in so scrutinizing the settlement nor did it err in exercising its judicial discretion when it refused, on December 20, 1946, to sanction the agreement.

II. The District Court Did Not Err in Denying the Motions for Entry of Judgment Upon Stipulation or, in the Alternative, for Summary Judgment or for Leave to File Supplemental Complaint.

The stipulation for entry of judgment was filed and presented on April 19, 1946 (R. 22). After hearings and the introduction of evidence in support of the stipulation, the District Court refused, on December 20, 1946, to enter judgment thereon (R. 110-125). We have demonstrated in Section I of this brief that said refusal was not error.

On May 14, 1947, the Portal-to-Portal Act of 1947 became effective. On September 22, 1947, Appellee filed an amended

answer raising affirmative defenses under that Act (R. 139-142). More than two years later, on December 19, 1949, Appellants filed motions for (a) entry of judgment pursuant to the stipulation of April 19, 1946, (b) for summary judgment on the basis of the settlement or compromise embodied in that stipulation or (c) for leave to file a further supplemental complaint based on such compromise and settlement (R. 143-160). These motions were denied on July 31, 1950 (R. 172-173). We now turn to a consideration of Appellants' attack on the denial of such motions.

A. THE MOTION FOR ENTRY OF JUDGMENT ON THE STIPULATION WAS PROPERLY DENIED.

1. Fed. Rules Civ. Proc., Rule 68, 28 U.S.C.A.

Is Inapplicable to This Case.

Appellants make their motion pursuant to Fed. Rules Civ. Proc., Rule 68, 28 U.S.C.A. (R. 143). They argue that this rule affects the instant case (Brief p. 24). The rule provides for Offer of Judgment and is concerned only with the effect of such an Offer on costs. It has no bearing on the entry of a consent judgment. *Cf: Maguire v. Federal Crop Insurance Corp.*, 181 F.2d 320 (C.A. 5th 1950) (offer of compromise not within Rule 68).

2. Certain of the Grounds Sufficient to Sustain the Refusal to Enter Judgment on December 20, 1946, Still Existed on July 31, 1950.

We have demonstrated (*supra*, pp. 22-27) that the refusal to accept the stipulation was not erroneous because (1) the jurisdiction of the court had not been adequately established, (2) the existence of a claim had not been adequately established, and (3) the judgment was not in the public interest. We shall briefly re-examine these grounds

in light of the law existing on July 31, 1950, reserving, however, full discussion of the effect of the Portal-to-Portal Act of 1947 for the very next subsection.

(1) *Lack of Jurisdiction:*

Diversity jurisdiction has never been established.

No additional *evidence* has been adduced to demonstrate, to the satisfaction of the court, which of, if any, and for what period, Appellants, and each of them, were "engaged in the production of goods for commerce."

The decision of *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) now makes it clear that the employer's being under a Government cost-plus contract does not of itself preclude coverage. Nonetheless, each claimant must show that *his* activities qualify. This has never been satisfactorily done.

(2) *Lack of a Claim:*

No additional evidence has been adduced to demonstrate, to the satisfaction of the court, that each of the Appellants had a valid claim for the period involved.

(3) *Failure to Meet the Public Interest:*

The questions as to coverage raised by the trial court have never been eliminated. Section 3 of the Portal-to-Portal Act sanctions compromises "if there exists a bona fide dispute as to the amount payable by the employer to his employee * * *" 29 U.S.C.A. Sec. 253(a). Until the coverage issues are disposed of, the dispute here may involve more than a dispute "as to the amount payable." Section 3 also excepts from its approval compromises settled "on a payment for overtime at a rate less than one and one-

half times such minimum hourly wage rate." 29 U.S.C.A. Sec. 253(a). The formula used for computations caused 24 of the claimants to agree to amounts less than the overtime wages demanded. The requirements of Section 3 have not been met. *Cf.: Stilwell v. Hertz Drivursel Self Stations*, 174 F.2d 714 (C.A. 3rd 1949).

The decision in *Powell v. United States Cartridge Co.*, *supra*, p. 29, indicates that the United States is not to be treated as the real party in interest in the instant case. This factor standing alone would cast doubt on the propriety of the denial of this motion on this ground. However, the uncorrected infirmities discussed above constitute ample support for the denial. Moreover, there exists, as a result of the enactment of the Portal-to-Portal Act of 1947, a supervening infirmity: the glaring and overriding defect of which Appellants are completely oblivious and which they totally ignore. To this we now turn.

3. The Enactment of the Portal-to-Portal Act of 1947 Deprived the District Court of Jurisdiction Over This Matter.

The complaint in the instant case was filed on December 7, 1945. A [first] supplemental complaint naming additional plaintiffs was filed January 30, 1946. The nature of the claims may best be gleaned from the following allegations made by Appellant Macklin:

"* * * said plaintiff was employed by defendant as aforesaid at the regular hourly rate of 95¢ and was paid at said rate, with time and one half for certain of the overtime hours worked by him, *including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid, said plaintiff was employed and compelled by defendant to work thirty (30) minutes per day as*

*a result of the fact that plaintiff was required to report for roll call, inspection, and other duties 30 minutes in advance of going on patrol of his regular beat; * * **” (Complaint, R. 5).

The allegations of the other Appellants are similar (R. 8, 10-11).

It is clear that the claims are founded on “preliminary” activities which were not part of Appellants’ regular duties. At the time of filing, the Complaint may have stated a claim upon which relief could be granted, *Baker v. California Shipbuilding Corp.*, 73 F. Supp. 322 (D.S.D. Cal. 1947), because of the interpretation of the Fair Labor Standards Act in cases like *Jewell Ridge Coal Corp. v. United Mine Workers*, *supra*, p. 15, and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The veritable flood of actions occasioned by these decisions, brought by claimants eager to share in the “windfall” of overtime compensation for preliminary and postliminary activities—the so-called “portal-to-portal” activities—was a compelling reason for the enactment of the Portal-to-Portal Act of 1947. Congress, faced with a major threat to the economic equilibrium of the country, took decisive action. The amendment became effective on May 14, 1947. C. 52, Secs. 1 et seq., 61 Stat. 84; 29 U.S.C.A. Section 251, et seq.

Congress was selective in its pruning. Not all claims were destroyed. Spared were those based on “an activity which was compensable by either (1) an express provision of a written or nonwritten contract in effect, at the time of such activity * * *; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place

where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity * * * 29 U.S.C.A. Sec. 252(a). All other claims were destroyed.

The activities upon which Appellants found their claims are clearly within the interdiction of the statute. The complaint and the [first] supplemental complaint are devoid of any allegations that the activities were compensable by contract or custom. From May 14, 1947 on, they no longer stated a claim upon which relief could be granted. 29 U.S.C.A. Sec. 252(a). The requirement is jurisdictional. 29 U.S.C.A. Sec. 252(d). The District Court therefore was deprived of jurisdiction in this case. *Bauler v. Pressed Steel Car Co., Inc.*, 182 F.2d 357 (C.A. 7th 1950); *Potter v. Kaiser Company, Inc.*, 171 F.2d 705 (C.A. 9th 1949); *Battery Workers' Union v. Electric Storage Battery Co.*, 78 F. Supp. 947 (D.E.D. Pa. 1948). "Nor does the lack of jurisdiction seem any the less manifest because jurisdiction existed at the time of the commencement of the various actions." Medina, D. J. in *Bartels v. Sperti, Inc.*, 73 F. Supp. 751, 753 (D.S.D. N.Y. 1947).

4. There Is No Escape for Appellants from the Bar of the Portal-to-Portal Act of 1947.

This case is to be decided according to existing law. *Woods v. Schmid*, 164 F.2d 981 (C.C.A. 5th 1947); *McCloskey v. Eckart*, 164 F.2d 257 (C.C.A. 5th 1947). It was pending at the time of the enactment. The Portal-to-Portal defenses were properly raised by Appellee's Amended Answer filed, with leave of court, on September 22, 1947 (R. 130). They may be raised any time before a final judgment becomes no longer subject to review, e.g., after denial of

certiorari by the Supreme Court;⁸ *sua sponte* by the Court of Appeals;⁹ in the District Court;¹⁰ after entry of judgment on default,¹¹ even despite procrastinating delays of the defendants.¹²

The "judgment" (Order of Dismissal) in the instant case, while final for purposes of appeal, is, of course, subject to review. The Portal-to-Portal defenses are therefore properly before this Court.

The presence of a stipulation for entry of judgment is of no aid to Appellants. It does not transmute Appellants' claims into a higher order of being, impervious to the orderly processes of judicial administration. In *Blount v. Windley*, 95 U.S. 173, 176 (1877), the court said:

"The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged; and, in deciding how far it may be affected by legislation, we must look mainly to the original contract."

A *judgment* is not impregnable; *a fortiori* a stipulation for judgment is not.

It is pertinent to quote again from *Walling v. Miller*, *supra*, p. 11:

⁸Alaska Juneau Gold Mining Co. v. Robertson, 331 U.S. 793 (1947); 149 Madison Avenue Corp. v. Asselta, 331 U.S. 795 (1947).

⁹Tipton v. Bearl Sprott Co., Inc., 175 F.2d 432 (C.A. 9th 1949).

¹⁰United States Cartridge Co. v. Powell, 185 F.2d 67 (C.A. 8th 1950).

¹¹McCloskey & Co. v. Eckart, 164 F.2d 257 (C.C.A. 5th 1947).

¹²Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (C.A. 6th 1949).

“On the other hand, if the court lacks power to adjudicate such a cause of action in the first instance, it lacks power also to sanction a stipulation of settlement by entering a consent decree.”

The rule that parties cannot confer jurisdiction by consent bears with all of its might on the instant case and precludes any recovery by Appellants (see *supra*, p. 11).

The provisions of Section 3 of the Portal-to-Portal Act, 29 U.S.C.A., Sec. 253, are of no aid to Appellants. Appellants argue that Section 3 has retroactively validated compromises of disputes arising under the Fair Labor Standards Act (Brief pp. 45-47). We have already indicated that not all compromises were validated (*supra*, pp. 29-30). There is, however, an even more complete answer to Appellants' arguments.

Appellants omitted two words when quoting said section, the two words “as amended.” Subsection (a) therefore reads as follows:

“Any cause of action under the Fair Labor Standards Act of 1938, *as amended*, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to May 14, 1947, or any action (whether instituted prior to or on or after May 14, 1947) to enforce *such a cause of action*, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; * * *” 29 U.S.C.A. Sec. 253(a).

What Congress validated, as the plain language of the statute discloses, was the compromise of either a cause of action under the Fair Labor Standards Act *as amended* or of an action to enforce such a cause of action. The Portal-to-Portal Act amended the Fair Labor Standards

Act. *Holland v. General Motors Corp.*, 75 F. Supp. 274 (D.W.D.N.Y. 1947), *affirmed sub nom, Battaglia v. General Motors Corp.*, 169 F.2d 254, *cert. denied*, 335 U.S. 887. Appellants no longer have a "cause of action under the Fair Labor Standards Act of 1938, as amended." Nor is this action one "to enforce such a cause of action." Appellants seek to invoke one section which gave life to certain classes of compromises while they completely ignore the immediately preceding section which destroyed their claims (causes of action) and deprived the court of jurisdiction over the entire action. "When the root is cut the branches fall." Holmes, J., in *Smallwood v. Gallardo*, 275 U.S. 56, 62 (1927).

Since Appellants lack a meritorious claim, opportunity to amend would be futile. Whenever the requirements of Section 2 of the Portal-to-Portal Act, 29 U.S.C.A., Section 252, are first called to the attention of claimants, an opportunity to amend is ordinarily given. *Tipton v. Bearl Sprott Co., Inc.*, *supra*, p. 33. The Portal-to-Portal Act provides no period of limitation for such an amendment.¹³

The Portal-to-Portal Act of 1947 became law on May 14, 1947. The defenses thereunder were forcibly brought home to Appellants on September 22, 1947, on which date Appellee's Amended Answer was filed. Appellants had anticipated the applicability of its provisions (R. 150). At no time have Appellants amended or requested leave to amend their complaint to show the necessary jurisdictional allegations. Appellants have "the burden of clearly stating and proving [themselves] within an exception of the Portal-to-Portal Act in order to sustain the Jurisdiction of the

¹³Compare 29 U.S.C.A. Sections 255-257.

Court." *Bumpus v. Remington Arms Co., Inc.*, 183 F.2d 507, 513 (C.A. 8th 1950). Appellants have done nothing to sustain this burden. The [second] supplemental complaint tendered December 19, 1949 (R. 157-160) cannot, by the wildest stretch of imagination, be construed to supply the missing allegations of compensability. It may be fairly inferred there are none. *Cf: Adkins v. E. I. DuPont de Nemours & Co.*, 176 F.2d 661 (C.A. 10th 1949), *cert. denied*, 338 U.S. 895.

It is not necessary to rely on inference alone. Appellants concede that the instant case is similar in all respects, save the presence here of a stipulation for judgment, with *Potter v. Kaiser Company, Inc.*, *supra*, p. 32 (R. 151). The *Potter* case was dismissed because the complaint failed to state a claim upon which relief could be granted and for lack of jurisdiction. This Court affirmed in a per curiam decision. 171 F.2d 705. There was no "contract" or "custom" there to save the claims; there is none here.

Moreover, there are damaging admissions in the record. Paragraph 18 of the affidavit filed in support of the three motions, reads as follows:

"18. That for several months thereafter counsel for plaintiffs were both extremely busy with other litigation of considerable importance and also undecided as to what course of action to take in this case in view of the fact that this Court had declined to approve the aforesaid settlement and *the Circuit Court of Appeals in the Potter case appeared to have foreclosed recovery on the merits of the original cause of action*, but that said counsel at all times took the position that said settlement was legal and binding." (R. 153; also see R. 191).

On this record, it is clear the complaint is fatally defective. This Court so held in affirming the dismissal of the companion *Potter* case. Appellants have not, and could not now in good conscience, amend and cure the defect. On this basis alone the order of dismissal should be affirmed.

B. THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The motion for summary judgment, made pursuant to Fed. Rules Civ. Proc., Rule 56, 28 U.S.C.A., was properly denied. As hereinabove fully demonstrated, the complaint fails to state a claim upon which relief can be granted. The District Court lacked jurisdiction. On such a record the District Court should have dismissed for want of jurisdiction. *Jones v. Brush*, 143 F.2nd 733 (C.C.A. 9th 1944). The denial of the motion for summary judgment was not error. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

C. THE MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT WAS PROPERLY DENIED.

1. The [Second] Supplemental Complaint, if It Purports to State a Claim Arising Under the Fair Labor Standards Act, as Amended, Fails to State a Claim Upon Which Relief Can Be Granted.

As hereinbefore noted (*supra*, pp. 30-32), the complaint and the [first] supplemental complaint state claims arising under the Fair Labor Standards Act for activities which are purely "preliminary." The Portal-to-Portal Act of 1947 precludes recovery thereon unless such activities were "compensable by either (1) an express provision of a written or nonwritten contract * * * or (2) a custom or practice * * * not inconsistent with a written or nonwritten contract * * *." 29 U.S.C.A. Sec. 252(a). The complaint and the [first] supplemental complaint contain no allegations with

respect to compensability by either a contract or a custom or practice. These complaints have never been amended. The [second] supplemental complaint contains no such allegations.

No claim upon which relief can be granted is stated.

2. The [Second] Supplemental Complaint, if It Purports to State a Claim Arising Under Section 3 of the Portal-to-Portal Act, Fails to State a Claim Upon Which Relief Can Be Granted.

Section 3 of the Portal-to-Portal Act does not purport to create a new cause of action based on compromises. *See*: 29 U.S.C.A., Sec. 253(c); *Cf.*: *McCloskey v. Eckart*, *supra*, p. 32. Even if it did, the compromises recognized are only those of a dispute "as to the amount payable" and the agreement cannot be based on "a rate less than one and one-half times such minimum hourly wage rate." 29 U.S.C.A. Sec. 253(a). As hereinbefore noted (*supra*, pp. 29-30), this compromise is not within said Act.

Moreover, the only cause of action created (if it be assumed that Section 3 did so) is a cause of action arising under the Fair Labor Standards Act, *as amended*. As hereinbefore noted (*supra*, pp. 31-37), Appellants have no such cause of action.

No claim upon which relief can be granted is stated.

3. To the Extent the [Second] Supplemental Complaint Is Founded on the Fair Labor Standards Act and the Portal-to-Portal Act, It Does Not Contain Necessary Jurisdictional Allegations.

For the foregoing reasons, the [second] supplemental complaint is devoid of the necessary jurisdictional allegations. 29 U.S.C.A. Sec. 252(d). The District Court lacks jurisdiction thereover.

4. The [Second] Supplemental Complaint, if It Purports to State a New, Independent Claim, Fails to State a Claim Upon Which Relief Can Be Granted.

The allegations of the [second] supplemental complaint indicate that Appellants found their claim on an alleged breach of contract (R. 157-160). The "contract" which, so it is alleged, Appellee has broken is set forth in the Record (R. 22-27). Appellee merely agreed "that judgment may be made and entered by the above entitled Court * * *." (R. 24). A stipulation for entry of a consent decree is not a contract. *Cf: United States v. Swift & Co.*, 286 U.S. 106 (1932); *Fleming v. Huebsch Laundry Corp.*, 159 F.2d 581 (C.C.A. 7th 1947).

Furthermore, even if it be assumed there was a contract, there was no breach thereof by Appellee. The *court* refused to enter judgment.

Appellants allege:

"That thereafter defendant refused and still refuses to make the payments agreed upon under said compromise and settlement." (R. 158).

Appellee agreed to the entry of *judgment* for payment (R. 24). There was no promise to pay, save on condition that a judgment be entered. That judgment was never entered. The non-entry cannot be attributed to Appellee. There has been no breach.

5. To the Extent the [Second] Supplemental Complaint Is Founded on a New, Independent Claim, It Does Not Contain Necessary Jurisdictional Allegations.

As a cause of action in contract, jurisdiction is allegedly founded on diversity of citizenship (R. 157). Said complaint is defective in two respects:

(1) There is no allegation of diversity of *citizenship*. 28 U.S.C.A., Sec. 1332. Appellants have alleged that "all of the plaintiffs are residents and inhabitants of states other than that of the defendant herein * * *" (R. 157). This allegation is clearly insufficient to establish diversity jurisdiction. The words "inhabitants" and "residents" are not synonymous with "citizens" for these purposes. *Neel v. Pennsylvania Co.*, 157 U.S. 153 (1895); *Grace v. American Central Insurance Co.*, 109 U.S. 278 (1883); *Jeffcoat v. Donovan*, 135 F.2d 213 (C.C.A. 9th 1943); *Allen B. Wrisley Co. v. George E. Rouse Soap Co.*, 90 Fed. 5 (C.C.A. 7th 1898).

(2) The amount involved does not meet the jurisdictional amount. 28 U.S.C.A., Sec. 1332. Appellants have alleged that "this cause involves the claim of plaintiffs for in excess of \$3,000.00" (R. 157). The claim of each Appellant is a separate and distinct claim. None of these claims exceeds \$3,000 (Exhibit A to said Complaint, R. 159-160). The claims cannot be aggregated for purposes of determining the jurisdictional amount. *Pinel v. Pinel, supra*, p. 23; *Woodside v. Beckham*, 216 U.S. 117 (1910); *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466 (C.A. 10th 1949); *Willis v. E. I. DuPont de Nemours & Co.*, 171 F.2d 51 (C.A. 10th 1948); *Fisch v. General Motors Corp., supra*, p. 14; *Tittle v. General Motors Corp.*, 80 F. Supp. 333 (D. Conn. 1948). While attorneys' fees may be aggregated with the demands of each claimant, the pro rata share of the fees involved herein are insufficient to raise the particular claim to the requisite amount.

6. A Supplemental Complaint, Alleging a Contract Claim, Founded Upon a Stipulation for Entry of Judgment, in an Action Wherein the Original Complaint Fails to State a Claim Upon Which Relief Can Be Granted, May Not Be Filed.

Even if it be assumed that the original complaint filed herein stated a claim upon which relief can be granted, and that the stipulation created a valid contract, the subject matter of said contract was within the reach of Congress. The basic claims sprang from statutory rights created by Congress upon the enactment of the Fair Labor Standards Act. Congress has authority to modify, alter or destroy these rights. Contracts based thereon are subject to this "congenital infirmity." *Louisville & Nashville R.R. v. Motley*, 219 U.S. 467 (1911); *Bateman v. Ford Motor Co.*, 76 F. Supp. 178 (D.E.D. Mich. *en banc* 1948), *affirmed sub nom Fisch v. General Motors Corp.*, 169 F.2d 266, *cert. denied*, 335 U.S. 902; *Holland v. General Motors Corp.*, *supra*, p. 35.

In the leading case, *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307 (1935), Chief Justice Hughes, speaking for the court, said:

"Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

If the [second] supplemental complaint be treated as an amendment to the original complaint, which failed to state

a claim upon which relief can be granted, on the enactment of the Portal-to-Portal Act, it is insufficient to cure the defects therein. As a supplemental claim, arising subsequent to the filing of the original complaint, which failed to state a claim upon which relief can be granted, on the enactment of the Portal-to-Portal Act, it is insufficient. *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (C.A.2d 1949); *Bowles v. Senderowitz*, 65 F. Supp. 548 (D.E.D. Pa. 1946), *affirmed on other grounds*, 158 F.2d 435, *cert. denied*, 330 U.S. 848; *Berssenbrugge v. Luce Manufacturing Co.*, 30 F. Supp. 101 (D.W.D. Mo. 1939). In the *Bonner* case, the court said:

“For where the pleading sought to be supplemented is a complaint that fails to state a cause of action (as the original amended complaint here failed, on the enactment of the Portal to Portal Act), the plaintiff cannot avoid the effect of lack of jurisdiction over the original action by alleging a new cause of action subsequently accruing because of later transactions, occurrences or event.” (At page 705 of 177 F.2d.)

The stipulation for entry of judgment does not call for a different rule. *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Woods v. Schmid*, 164 F.2d 981 (C.C.A. 5th 1947). In the *Rhodes* case, an injunction against the enforcement of judgments of eviction obtained in state courts was refused by the District Court. The Supreme Court reversed, although assuming the judgments valid when entered, because of the retroactive effect of the Emergency Price Control Extension Act. The Court, at page 107 of 331 U.S., said:

“Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution * * *. Immunity

from federal regulation is not gained through forehanded contracts * * *. The rights acquired by judgments have no different standing."

Similarly, in *Woods v. Schmid*, *supra*, p. 32, an injunction was sought. The District Court denied the injunction with respect only to those judgments obtained by stipulation. The Circuit Court of Appeals held this error, saying at page 982 of 164 F.2d:

"It therefore becomes manifest that, although the eviction agreements with the tenants were not illegal when made, any attempt to enforce them after the Price Control Extension Act had been passed was unlawful, as they had then been invalidated by the very provisions of the Act itself."

In the instant case, we have at most an agreement for the entry of judgment which at one time *may* have been valid. Legislation admittedly constitutional now makes such an agreement invalid. It is unenforceable.

III. The District Court Did Not Err in Dismissing the Action for Want of Prosecution.

A. THE DISTRICT COURT HAS POWER TO DISMISS FOR WANT OF PROSECUTION ON ITS OWN MOTION.

An inherent power vested in trial courts is the power to dismiss for want of prosecution. This power exists independently of statute. It may be exercised by United States District Courts. *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F.2d 825 (C.C.A. 10th 1948); *Sweeney v. Anderson*, 129 F.2d 756 (C.C.A. 10th 1942); *Walker v. Spencer*, 123 F.2d 347 (C.C.A. 10th 1941), *cert. denied*, 316 U.S. 692; *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (C.C.A. 9th 1940). It may even be exercised in criminal proceedings.

United States v. McWilliams, 163 F.2d 695 (App. D.C. 1947).

B. THE EXERCISE THEREOF MAY BE REVERSED ONLY FOR GROSS ABUSE OF DISCRETION.

"The trial judge who has litigants before him over long periods knows the diligent suitors from those who are not diligent." *Partridge v. St. Louis Joint Stock Land Bank*, 130 F.2d 281, 287 (C.C.A. 8th 1942). "* * * A trial court's evaluation of the parties' diligence carries almost commanding weight * * *." *United States v. Pacific Fruit & Produce Co.*, 138 F.2d 367, 371 (C.C.A. 9th 1943). "* * * The question whether the action should be dismissed on the court's own motion for failure to prosecute with reasonable diligence rests largely in the sound judicial discretion of the court and its action with respect thereto will not be overturned on appeal except in case of abuse of such discretion." *Shotkin v. Westinghouse Electric & Mfg. Co.*, *supra*, at page 826 of 169 F.2d. "And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable." *United States v. McWilliams*, *supra*, at page 697 of 163 F.2d.

In this Court, a GROSS abuse of discretion must be shown to warrant reversal. *Hicks v. Bekins Moving & Storage Co.*, *supra*, p. 43.

C. THERE WAS NO ABUSE OF DISCRETION IN THE INSTANT CASE.

**1. The "Ruling" of the District Court on January 3, 1950,
Did Not Preclude the Subsequent Order of Dismissal.**

During oral proceedings had before the court below, after a prior warning of a possible dismissal for want of prosecution, and in response to a statement by counsel for Appellee

that defendant would not request a dismissal for want of prosecution, the court said:

"I think in view of that situation the Court will not dismiss the case on its own motion." (R. 166)

Appellants in their brief consistently ignore the emphasized words (Brief pp. 8-9, 10, 51) and, by omitting them, purport to make of it a positive statement (Brief p. 65).

Qualified as the statement was, it cannot be classified as a "ruling" despite repetitious labelling of it as such by Appellants.¹⁴ Even if it were a "ruling", the court below could subsequently reverse itself. Indeed, that is what Appellants asked of the court, with respect to the refusal to sanction the settlement in 1946, by filing their motions on December 19, 1949. Furthermore, Appellants have shown no prejudice to raise an estoppel, if such be their theory. ~~Furthermore~~, they had had previous notice in open court of the possible dismissal (R. 161-164), were afforded and took advantage of the opportunity to file an affidavit in opposition thereto (R. 145-156, 166).

¹⁴If the trial court's use of the words "I think" constitutes a ruling, then it is interesting to note the number of rulings that the trial court made during the proceedings of December 12, 1949:

"I think you are asking a good deal of the Court * * * *I think* that there wasn't anything in the case before the passage of the Taft-Hartley Act, and *I don't think* so yet, as far as I am concerned * * * I will look your amended pleading over and see whether *I think* there is any grounds to go ahead * * * I am holding this case for dismissal. *I think* there has been a great deal of laches and lack of diligence upon the part of plaintiffs to ever want to try this case * * * As I say, *I think* I am going to dismiss this case, but I want to know what you have in mind * * * *I think* you have been out of court for several years myself." (R. 162-164).

Obviously, the phrase "I think" is used by the trial court in expressing tentative views for the enlightenment of counsel and the stimulation of discussion and not for the purpose of making positive and definitive rulings.

In a formal order denying motions and dismissing cause dated July 31, 1950, the court below set forth its "Findings as to Prosecution of the Case" (R. 177-185). These findings are uncontroverted and clearly support the Order of Dismissal.

2. The Total Lapse of Unexcused Time Is Sufficient to Demonstrate Lack of Diligence.

The complaint was filed on December 7, 1945. Four years and twelve days later Appellants filed their motions for judgment and for leave to file a further supplemental complaint (R. 143-144).

Certain of the intervening delays are excusable. From the date of commencement (December 7, 1945) until the date the stipulation was rejected (December 20, 1946), the case was either actively prosecuted or under submission. Thus, a period of one year and two weeks is excluded so far as delay is concerned.

With respect to delays attributable to Appellee, Appellants refer to "the repeated extensions of time requested by defendant" and say that "delays for the next ten months were due to requests by defendant for extensions of time and its delay in filing an amended answer" (Brief pp. 57-58), the latter reference apparently being to the period following December 20, 1946. Appellants are overly generous in crediting Appellee with time consumption. Appellee procured extensions in connection with (1) interrogatories of Appellants and (2) the filing of an amended answer (see "Findings as to Prosecution of the Case," R. 177-185, and Docket Entries, R. 193-197). Appellants filed interrogatories on February 3, 1947, and Appellee's time to answer or object thereto was extended from February 14 to April 8,

1947, a period of less than two months. Oddly enough, on the filing of Appellee's objections, the interrogatories were withdrawn and the case became dormant. Then, from August 4 to September 22, 1947, a period of one month and a half, Appellee was granted time to file an amended answer; and the case soon went back to sleep again. While it is thus apparent that the extensions granted Appellee interrupted rather than induced the somnolence, Appellee does not resist being charged with the actual extent of these delays, totalling three months and one week.

Combining the original year and two weeks of activity with extensions granted Appellee, the result is that Appellants definitely cannot be charged with responsibility for one year, three months and three weeks of the total period of over four years. But what of the remainder?

The period from January 28, 1948, to February 14, 1949, involves the delay resulting while the *Potter* case was in the process of appeal to and consideration by this Court. The record is clear that this delay was by mutual consent of counsel for both Appellants and Appellee, and the latter recognize their participation in and co-responsibility for the delay. But here the question is whether in the eyes of the trial judge the delay was excusable and whether he was bound to recognize the arrangement of convenience that the parties had entered into; and it is pertinent to observe that such arrangement was not called to the trial court's attention until December 19, 1949 (R. 153), months after this particular delay had occurred.

Even if this period be considered excused, the total excused periods amount to two years and four months, leaving a period of at least one year and eight months un-

explained and unexcused. In *United States v. Bernstein*, 166 F.2d 466 (C.C.A. 5th 1948), a dismissal after a delay of one year and four months was held not to constitute an abuse of discretion.

Appellants seek refuge in a local practice of calling court calendars, in the absence of a particular judge, and in the inactivity of Appellee. This is an attempt to shift the burden of prosecution to the court or to the defendant. The burden rests squarely on the plaintiff in a cause at every stage of the proceedings diligently to prosecute his action. The burden cannot be shifted. Appellants have failed to sustain their burden. *Hicks v. Bekins Moving & Storage Co.*, *supra*, p. 43.

3. Additional Factors Lend Further Support to the Propriety of the District Court's Dismissal for Want of Prosecution.

Appellants seek to distinguish the cases relied upon by the court below because the *facts* differed. Factual similarity is not a sine qua non of persuasive and controlling precedent. In rulings within the discretion of a court, the facts and circumstances of each particular case must be examined. There are factors over and above a merely temporal measure of lack of diligence which support the ruling of the court below.

Appellants were undecided as to what course to pursue and unwilling to proceed with a trial on the merits. On December 20, 1946, the court rejected the stipulation. Two avenues were then open to Appellants: (1) submit to a judgment of dismissal and then appeal therefrom, or (2) proceed with a trial on the merits. The court below would have permitted either (R. 128-129). First Appellants apparently elected to try the cause, for interrogatories were

filed on February 3, 1947, but they were withdrawn on May 19, 1947, after objections thereto were filed and after the enactment of the Portal-to-Portal Act (R. 149-150, 181-182, 195). *No further move was ever made toward a trial on the merits.* On September 22, 1947, the amended answer was filed and the setting for pre-trial conference, after several postponements, was indefinitely postponed on November 18, 1947.

Thereafter, Appellants were totally inactive (part of the time awaiting the *Potter* decision) until the court on November 28, 1949—two years later—set the case for call on December 5, 1949. At that December 5 hearing, counsel for Appellants said:

“I think that quite likely, in view of those facts [the refusal to approve the settlement and the *Potter* decision], the plaintiffs will not desire to press the matter further. However, this case is Mr. Mowry’s, with whom we are associated, and although I have discussed the matter with Mr. Mowry I do not have at this time authority so to advise the Court. So I would suggest, if it is agreeable to the Court, that the matter be continued on call for one week, at which time I would hope to have discussed the matter further with Mr. Mowry and be in a position to advise the Court definitely of the plaintiffs’ position as to whether or not plaintiffs will want to continue this matter any further or make any further attempt to prosecute the case.” (R. 191-192).

Then at the December 12 hearing, Appellants requested an additional week “in which to further plead or to file a motion, perhaps, for leave to file a supplemental complaint in the case” (R. 161). The resultant pleadings constituted

nothing more than the resubmission of matters already decided against the Appellants (correctly, as we have demonstrated) and in no wise constituted a willingness to try the case on the merits.

Unwillingness to proceed with the trial of a cause is an omen of lack of diligence. *Partridge v. St. Louis Joint Stock Land Bank, supra*, p. 44. The flurry of motions stirred up by the trial court's prophetic warning cannot exculpate the Appellants. They could have been made much sooner. Appellants admit the court "could have tried this case a good many years ago * * *" (R. 163). "* * * Subsequent diligence is no excuse for past negligence * * *." *Hicks v. Bekins Moving & Storage Co., supra*, at page 409 of 115 F.2d.

As hereinbefore noted (*supra*, pp. 30-32), the enactment of the Portal-to-Portal Act of 1947 caused a fatal weakness in Appellants' claims. The complaint and [first] supplemental complaint no longer stated a claim upon which relief could be granted. The District Court was thereupon deprived of jurisdiction. A duty immediately arose in Appellants to amend so that the necessary jurisdictional allegations appeared on the Record. No such amendment has ever been made or tendered. The burden so to do clearly rests on Appellants. *Bumpus v. Remington Arms Co., Inc., supra*, p. 36. The failure to sustain this burden is further evidence of lack of diligence.

It has also been shown above (*supra*, pp. 32-37) that Appellants no longer have a meritorious claim, assuming they once did, as a result of the Portal-to-Portal Act, the failure to amend, the decision in the *Potter* case, and the studied avoidance of a trial on the merits. The non-existence of a meritorious claim is of added weight in favor of

the propriety of a dismissal for want of prosecution. *United States v. Pacific Fruit & Produce Co.*, *supra*, p. 44; *Partridge v. St. Louis Joint Stock Land Bank*, *supra*, p. 44.

On this record, the findings of the court below with respect to the prosecution of this case cannot be impeached. They clearly support the Order of Dismissal for Want of Prosecution. There is no showing of abuse of discretion. The Order should be affirmed.

CONCLUSION

It appearing from the foregoing discussion that the orders of the trial court were within its powers and its discretion, and no abuse of discretion appearing from the record, the orders appealed from should be affirmed.

Respectfully submitted,

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No. 12712

United States
Court of Appeals
FOR THE NINTH CIRCUIT

L. I. MACKLIN, et al,
Appellants,
v.
KAISER COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the
District of Oregon

APPELLANTS' REPLY BRIEF

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United States
Court of Appeals
FOR THE NINTH CIRCUIT

L. I. MACKLIN, et al,	} <i>Appellants,</i>
v.	
KAISER COMPANY, INC.,	
	<i>Appellee.</i>

APPELLANTS' REPLY BRIEF

THE POSITION OF APPELLEE ON APPEAL

In the trial court appellee considered it a matter of self interest to stipulate and jointly request entry of judgment against it for \$17,387.83 (R. 24) and to offer evidence admitting that this sum was "agreed to be owing" (R. 98-99). Even when the trial court expressed doubts as to the propriety of such a judgment defendant submitted a brief in support of its validity (R. 180 and Appendix A hereof) and as late as July 3, 1950, long after Judge Fee had originally refused to enter judgment, appellee stated that it still had "no objection to the entry of judgment in accordance with the stipulation" (R. 171).

This appeal asks no more than that the same judgment now be entered as both parties previously stipulated upon and jointly requested. One would thus expect that the same joint request for entry of judgment would be made in this court and, at least, that neither party would seek to interpose objections to the entry of such a judgment. Indeed there are established rules of law that on appeal both parties are bound by the same position and theories as taken before the trial court; that a fact or conclusion admitted in the lower court is binding upon a party on appeal; that a party will not be permitted to assume a position on appeal inconsistent with that taken by him in the trial court and that a judgment will not ordinarily be either affirmed or reversed on appeal upon grounds of defense not asserted in the trial court. 3 *Am. Jur., Appeal and Error*, pp. 35-7, 61, 417-424.

Now, however, while appellee concedes in its brief (p. 2) its duty in the *trial* court to abide by his stipulation for the entry of judgment, appellee now takes the position that it has no such duty whatever *on appeal*. In order to justify this result it is contended (p. 3) that the stipulation was conditioned upon rendition of a judgment. But even if this is true, there is nothing in the stipulation which prevented either party from seeking redress by appeal to require the trial court to enter a judgment in accordance with the stipulation or which prevented application to an appellate court for entry of such a judgment. Moreover, appellee admitted that the amount of the requested judgment was "agreed to be owing to plaintiffs" (R. 98-99).

Appellee next contends (p. 3) that this case does not involve any issue whether it “has failed to keep its bargain.” But stripped of all fine distinctions of legal sophistry the fact remains that appellee has failed to make payments “agreed to be owing” and has now for the first time interposed objections to the entry of judgment which it agreed to by stipulation. This would enable appellee to completely escape all liability for such an admitted debt.

By the foregoing tortuous process appellee finally (p. 3) cast aside its obligations under the stipulation for entry of judgment (never mentioning that it once admitted that the amount of the judgment was “agreed to be owing”) and concludes that it is under a duty to justify the trial court in refusing to enter judgment as previously stipulated and requested by both parties.

ARGUMENT

I. REPLY TO ARGUMENT THAT DISTRICT COURT DID NOT ERR IN REFUSING TO ENTER JUDGMENT BASED ON STIPULATION.

A. REPLY TO ARGUMENT THAT COURTS WILL NOT ABDICATE JUDICIAL FUNCTIONS AT INSTANCE OF THE PARTIES.

1. *The Issue.*

Apparently the parties are not in agreement as to

the issue in this case. Appellee would state (p. 3) the principal issue in this case as follows:

“The question is whether the trial court was stripped of its *power* to act as a judicial officer and its *right* to exercise sound judicial discretion merely because of the stipulation for judgment.”

While it is true that appellants take the position (1) that the courts have a *duty* to enter judgments based upon stipulations of the parties, it is also appellants' position (2) that this does not strip courts of their rights and powers as judicial officers, for reasons stated below; (3) that, at the least, courts have the *power* to enter judgments based on stipulations; (4) that in this case such power should have been exercised by entry of judgment and (5) that where, as here, the court refused to enter such a judgment and did so upon the ground that it had no power to do so it committed error.

2. *Courts under Duty to Enter Judgments on Stipulation and Not Thereby Stripped of Judicial Power.*

Appellee agrees (p. 9) with the policy of the law to encourage settlements, with the rule that settlements will be upheld even though a different result might follow a trial on the merits and that stipulations of fact are normally binding on the courts. Appellee takes issue, however, (at p. 9) with appellants' contention that the parties may stipulate to the entry of judgment and that it is then the *duty* of the court to enter judgment accordingly. No attempt is made to attack the

validity of the many authorities cited in appellants' brief (pp. 20-24) in support of this rule or even to distinguish them in any way. Indeed appellee ignores them completely and apparently calls upon this court to do likewise, including *Pacific Ry. Co. v. Ketchum*, 101 U. S. 289, 297; *Horniska v. Dolph* (C.A. 9), 133 Fed. 158; and Rule 68 of the Federal Rules of Civil Procedure.

Appellee next makes the point (pp. 9-10) that the entry of a consent judgment is a judicial function. This may be true, but still does not relieve the court from the duty to enter such judgments. Indeed freedom of action by the courts is circumscribed by innumerable statutes and rules of law imposing duties to act in specified ways under specified circumstances. Such is the entire basis of our system of jurisprudence and no one has ever suggested that because the courts do not have unlimited freedom of action in all cases they cease to function judicially and become mere "rubber stamps"—bound to act as commanded by statute or in accordance with long-established precedents. Thus the fact that a rule of law has been established to the effect that where the parties stipulate for the entry of judgment the courts have the duty to enter judgment accordingly cannot validly be urged as stripping courts of judicial power, but only as directing the courts to exercise such power in accordance with this rule of law.

3. *Cases Cited by Appellee do not Establish Contrary Rule.*

Appellee next (p. 10) cites nine cases as opposed to

the foregoing rule and as in support of the contrary contention that a court need not and will not "abdicate its functions as a court" merely because the parties have stipulated for the entry of judgment. These cases, mostly from district or state courts, are analyzed in Appendix B of this brief. As noted therein all of those cases are clearly distinguishable and fall far short of establishing the foregoing proposition. Thus they should require no further mention except to point out that the case of *Automobile Ins. Co. v. United States* (D. Or.) 10 F.R.D. 489 (J. Fee) serves well to illustrate the extreme lengths required by the same reasoning of Judge Fee as applied in this case, for if the parties to a settlement are to be required to go to the time and expense of a "full dress" pre-trial and trial, and if judgment is then to be entered only if the court approves the settlement in all particulars, including the exact amount to be paid, then the most important incentives for voluntary settlements are completely destroyed. Thus this entire course of action embarked upon by Judge Fee is completely contrary to the established policy of the law to encourage voluntary settlements (see Apts' Br. 14-23) and while in that case some scrutiny of the merits of settlements under the Tort Claims Act may be required by its express terms, the extension of such requirements to cases such as this is wholly indefensible.

But even if the cases cited by appellee be considered as in point and without distinction, it is nevertheless submitted that they wholly fail to overcome the numerous authorities cited in appellants' brief (pp. 20-24) to the effect that when the parties stipulate for entry of

judgment the court has the *duty* to enter judgment accordingly and must therefore be taken as representing a minority view upon this question.

4. *Even if court must first consider jurisdiction, execution of stipulation and fraud it THEN has duty to enter judgment as stipulated and acts judicially in doing so. These requirements are satisfied in this case.*

The most that can be said for the nine cases cited by appellee is that they tend in some measure to support the proposition next set forth in appellee's brief (pp. 11-12) to the effect that before entering judgment on stipulation a court will consider (1) Whether it has jurisdiction; (2) The existence and validity of the agreement and the power of the parties to execute it; (3) In some cases, whether the agreement is fair and equitable, and (4) Whether the agreement is free from fraud. It is then urged (p. 12) that in view of these "requirements" the trial court in considering a stipulation for judgment must do more than act as a "rubber stamp," but remains a judicial officer with the duty to exercise judicial discretion.

It must be conceded that there is some authority in support of the proposition that before entering judgment on stipulation the Court should be satisfied (1) that it has jurisdiction over the subject matter, (2) that the stipulation was duly executed by persons with proper authority, and (3) that there was no fraud. It follows, under this view, that in making such determina-

tions the court acts judicially and not as a "rubber stamp". It also follows under this same view, however, that once the court is judicially satisfied on these three points it then has the affirmative *duty* to enter judgment in accordance with the stipulation.

In this case, as demonstrated below (p. 11, 23), the court clearly had jurisdiction over the subject matter. No question has ever been raised as to the execution of the stipulation or the authority therefor. Nor has there ever been any suggestion of fraud. It therefore follows that even under the foregoing view Judge Fee had the duty to enter judgment as stipulated.

The further requirement suggested by appellee, namely, that in suits in equity and when the public interest is involved the court will inquire whether the agreement is fair and equitable, is wholly inconsistent with the concession by appellee (at p. 9) of the rule that generally a settlement will be upheld even though the court believes that a different result would have been attained by a trial on the merits. Likewise, the views of Judge Fee, who would require a trial on the merits, (see *Auto Ins. Co. v. United States*, *supra*) is wholly inconsistent with this established rule. The application of such a proposed requirement in cases under the Fair Labor Standards Act is discussed further below. But even conceding for purposes of argument alone that such a requirement is applicable in this case, which appellants strongly deny, the short and conclusive answer is that Judge Fee specifically found in this case on May 13, 1946, that "*the transaction was fair and regular and*

an appropriate settlement was arrived at.” (R. 103 at 105). Therefore this last of appellee’s purported requirements was also clearly satisfied and again it follows under appellee’s own theory that Judge Fee at least *then* had the duty to enter judgment as stipulated by the parties and as jointly requested by appellee at that time.

5. *The courts have not only the DUTY but the POWER to enter judgments based on stipulations and a court commits error in refusing to enter such a judgment upon alleged lack of power when ample power existed.*

The principal objections raised by Judge Fee concerned not his *duty*, but his *power* to enter judgment as stipulated by the parties. Thus he held that “. . . it was beyond the *power* of the court to enter any judgment” (R. 169). But, as demonstrated in appellants’ opening brief (pp. 24-47) and as further demonstrated below, all of his doubts as to power were wholly groundless.

Thus position of appellants on this issue is two-fold:

- (1) The trial court in this case had the affirmative *duty* to enter judgment as jointly requested by both parties, both (a) initially upon the basis of the stipulation of the parties and their joint request for entry of judgment and, at least, (b) upon the later completion of the hearing at which it clearly appeared that the court had jurisdiction over the subject matter, that the stipulation was properly authorized and executed, that the settlement was fair and regular and that there was no fraud.

(2) The trial court at least had the *power* to enter judgment as stipulated and jointly requested by the parties, upon either the basis of (a) or (b) above, and in failing and refusing to exercise such power on the ground that none existed the trial court proceeded to abuse its power and to decide this case on wholly untenable grounds, for which it is subject to reversal. *United States v. Fischer* (2nd Cir.) 93 F (2d) 488, 489.

It is thus clear that this case does not involve the question of stripping the courts of their judicial functions or of converting them into "rubber stamps." Appellants insist only that the courts recognize the duties imposed upon them by rules of law established, for the most part, by judicial decision and precedent and that the courts recognize and exercise the powers similarly established by long-standing precedent; that in so doing the courts act judicially and in complete accord with our system of jurisprudence, but that where a court both denies the existence of such duties and refuses to recognize and exercise such powers it ceases to act judicially and acts in an arbitrary manner and by so proceeding is subject to reversal.

B. REPLY TO ARGUMENT THAT COURTS COULD, PRIOR TO PORTAL-TO-PORTAL ACT, REFUSE TO ENTER JUDGMENTS ON STIPULATION IN CASES UNDER FAIR LABOR STANDARDS ACT.

1. *Once Jurisdiction of Court is Properly Invoked, it has Duty to Hear and Determine Case and such Jurisdiction is Not Dependent upon its Ultimate Decision.*

It is contended by appellee (at p. 14) that District Courts have limited jurisdiction, placing the burden on plaintiff "to have the record affirmatively show the existence of jurisdiction"; that consent of the parties cannot create such jurisdiction and that lacking jurisdiction over the subject matter the court lacks power to enter a consent judgment. Conversely, of course, appellee must concede that if a court has jurisdiction over the subject matter it would then at least have power to enter a consent judgment.

It is also equally important to bear in mind in this case that jurisdiction over cases arising under the Fair Labor Standards Act is based upon the fact that "the district courts shall have original jurisdiction of any action or proceeding under any Act of Congress regulating commerce or protecting trade and commerce" (28 U.S.C.A. Sec. 1337); that the Fair Labor Standards Act is such an act, *Robertson v. Argus Hosiery Mills*, 121 F (2d) 285, cert. den. 314 U.S. 681, and also specifically provides that actions to recover back wages "may be maintained in any court of competent jurisdiction," 29 U.S.C.A. sec. 216 (b); that jurisdiction of the District Courts is usually dependent upon the allegations of the complaint, whether well founded or not, *Utah Fuel Co. v. Nt. Bit. Coal Comm.*, 306 U.S. 56 at 60; that such jurisdiction of the District Courts is dependent upon the initial involvement of a federal question, not upon the tenability of plaintiffs' view at the ultimate decision; 1 *Barron and Holtzoff, Federal Practice and Procedure*, sec. 25, p. 51; that for jurisdiction to attach in such a case it is necessary only that it appear

that the action concerns an Act of Congress regulating commerce and such jurisdiction will not be defeated by the final interpretation given such Act. *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F. (2d) 193. See also *Toledo P. & W.R.R. v. Bro. of R. R. Trainmen*, 132 F (2d) 265, 268; that once a District Court acquires jurisdiction it retains power to decide the merits of a case even though it is ultimately found that no interstate commerce was involved, *Southern Pac. Co. v. Van Hoosear*, (9 Cir.) 72 F (2d) 903, at 911; *Oregon R. & N. Co. v. Campbell* (D. Ore.) 173 Fed. 957, at 966, aff'd. 230 U.S. 525. cf. *Jefferson v. Gypsy Oil Co.*, 27 F (2d) 304, at 306 and *Fielding v. Allen*, 181 F (2d) 163 at 166; and that once jurisdiction of the federal courts is properly invoked it becomes their duty to hear and determine a controversy, even though doubtful in nature, *Rogers v. Paving Dist. 1*, 84 F (2d) 555 at 557. See also *Los Angeles Ry. Corp. vs. Ry. Comm.* 29 F (2d) 140 at 143, aff. 74 L. Ed. 234 and *Doyle v. Northern Pac. Ry.*, 55 F (2d) 708 at 710.

The foregoing considerations also further support the view that the District Courts have ample power, as well as the duty, to enter judgments on stipulation in cases arising under the Fair Labor Standards Act. See also *Fleming v. Warshawsky & Co.*, 123 F (2d) 622 at 625; *Fleming v. Alderman*, 51 F. Supp. 800 at 801. cf. *Ulle v. Diamond Alkali Co.*, 67 F. Supp. 249. Nor is such jurisdiction destroyed by stipulation for judgment. *Swift & Co. v. United States*, 276 U. S. 311, at 325-7.

2. *Approval of Stipulations for Judgment in Actions for Back Wages under Fair Labor Standards Act Prior to Portal Act did not Involve Consideration of Whether "Fair and Equitable", but only Whether Coverage or other Legal Questions under Act had been Compromised.*

Appellee next contends (p. 14) that rights under the Fair Labor Standards Act are "colored with public interest." But it does not necessarily follow from this, as next contended (p. 15) that a court has power to refuse approval of such settlements merely because not in accordance with his personal views as to what is "fair and equitable." *Muschaney v. United States*, 324 U. S. 49 at 66. Nor do the cases cited by appellee (p. 15) support this conclusion.

Rogan v. Essex County News, 65 F. Sup. 82, held only that there should be a showing that "statutory requirements" had been met and cited cases holding that rights under the Act could not be waived. *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F (2d) 960, held only that full faith and credit *required* it to give effect to a consent decree by a state court which had found that a settlement under the act was fair and equitable and neither held or implied that the state court could have otherwise refused to approve the settlement. Nor does the analogy of the exercise of such powers in suits in equity (p. 12) hold true, since actions by employees to collect back wages under Section 16 (b) are not suits in equity.

It has been held that on *appeal* from a consent judgment under the Act, the only questions to be considered were (1) lack of federal jurisdiction, (2) lack of actual consent to the decree, and (3) fraud in its procurement. *Walling v. Miller*, 138 F (2d) 629, 631, citing *Swift v. United States*, *supra*. Thus it would also appear that, at the most, these same three factors are the only ones which can properly be considered by a court in passing upon a motion for entry of judgment based on stipulation in such a case, since if other factors could be considered by the trial court, the correctness of their consideration could also be raised on appeal.

The only other possible fourth factor for consideration by the trial courts, prior to the Portal to Portal Act in 1947, would be to see that, in view of *D. A. Shulte, Inc. v. Gangi*, 328 U.S. 108, there had been no compromise on any question of law, such as the question of coverage under the Act, and that the only compromise involved in the settlement was of questions of fact, such as the number of hours worked. Indeed this was the only initial question raised by Judge Fee on May 13, 1946, (R. 103 at 105) and, as later demonstrated, appellee was in complete agreement with appellants at that time that the requirements of the *Schulte* case were fully satisfied and that the Court both had jurisdiction to and should enter judgment as stipulated by the parties (See Appendix A).

It is thus submitted that even in employee actions for back wages under this Act the above four factors are the most that can properly be considered by the trial

court and that upon their being satisfied the court has both the power and duty to enter judgment as stipulated by the parties and would commit error in refusing to do so merely because of his personal views as to what is "fair and equitable." But even if this further factor could properly be considered in such cases, it was amply satisfied in this case by the finding of Judge Fee that this transaction was "fair and regular," which thus removed the last possible barrier to the entry of judgment as stipulated by the parties, with the result that he then had both the power and the duty to enter such judgment.

3. *Prior to the Portal-to-Portal Act Settlements of Claims under the Fair Labor Standards Act were Valid and Binding if they Involved no Compromise of Legal Questions but only Involved Questions of Fact.*

Appellee next contends (p. 15-17) that prior to enactment of the Portal-to-Portal Act the validity of *any* compromise of a claim arising under the Fair Labor Standards Act was generally in doubt, including not only compromises of disputes over coverage, but all other compromises, even though limited solely to a dispute over the number of hours worked.

The most conclusive answer to this contention is to refer to the specific language of the contentions made by appellee in the lower court on this same question, as set forth by the brief of appellee filed below and included in this record, but not printed, by stipulation (R. 146-9, 189, 204). That brief is included herein as Ap-

pendix A. It will thus be noted that before the trial court appellee contended that the *Schulte* decision is limited to compromises of "disputes over coverage" (Ap. 54); that it has "no application to the present case" (Ap. 56); that the court "should not extend" this doctrine (Ap. 59); that "the real issue here is a dispute over the number of hours worked" (Ap. 56); that neither the *O'Neil* or *Schulte* cases indicate that the parties cannot compromise such a dispute (Ap. 56); and "meant to preserve to the parties the right to enter into compromises" of such disputes (Ap. 57); that this is particularly true where, as here, the case involves "actual litigation in which the issues have been pleaded and a stipulation for entry of judgment has been submitted to the Court for its consideration and approval after both parties presented evidence with respect to the merits of the settlement" (Ap. 60); that no "issue with respect to coverage" is presented in this case (Ap. 61); that the only real issue related to the amount of time worked by plaintiffs (Ap. 62); that the proposed settlement "is one which the Court has characterized as 'fair and regular'" (Ap. 63) and that for these reasons the trial court both had jurisdiction and "power to enter judgment pursuant to the stipulation of the parties" (Ap. 64). See also *Urbino v. Puerto Rico Ry. Light & Power Co.*, 164 F (2d) 12 at 14.

It is submitted that the above arguments by appellee in its brief below not only completely disprove the present contentions of appellee, but that having taken such a position in the lower court appellee is bound by that position and is thereby estopped and should not

now be heard to urge the contrary (see *supra* p. 2, including 3 *Am. Jur.*, pp. 35-7, 61, 417-424).

4. “*JUDICIAL SCRUTINY*” of Consent
Judgments under Fair Labor Standards Act at Most Extends to Factors of (a) Jurisdiction, (b) Reality of Consent, (c) Fraud and, perhaps, (d) Whether Legal Questions have been Compromised.

Appellee next contends (pp. 17-20) that proposed consent judgments under the Fair Labor Standards Act are subject to “*judicial scrutiny*,” to what extent and purpose is not made clear, but the inference is left that the court has complete discretion whether or not to enter such a judgment; that according to the *Rogan* case, *supra*, there must at least be “either proof or stipulation of facts” showing “that the statutory requirements have been met,” and that otherwise the employer would not be protected by such a judgment.

Again, the best answer to these contentions is to be found in the position of appellee before the lower court, where it joined in asking that the stipulation for judgment be approved and judgment entered based thereon and in that connection submitted a brief contending that there had been ample proof submitted to support such a judgment in that “the testimony given at the hearing was typical of that which is to be expected in any litigation” (Ap. 50); that in view of the conflict of testimony the parties had acted reasonably in stipulating that “the plaintiff shall be paid for fifteen minutes each day and

shall receive overtime and liquidated damages based upon such time allowance." (Ap. 57); that there was no issue as to coverage in view of the fact that "it was conceded that the company itself was engaged in commerce or the production of goods for commerce" and the fact that investigations had disclosed that there were no facts to deny plaintiffs' allegations that each had engaged in work covered by the Act during each work week (Ap. 61-2); that the only fact in dispute related to the amount of time worked by plaintiffs, which was "a factual question on which the parties have agreed by stipulation" (Ap. 63); and that the Court had "full power to enter judgment pursuant to the stipulation of the parties." (Ap. 64).

It is therefore submitted that the proceedings in this case fully satisfy the purported requirement of "either proof or a stipulation of facts" showing that the statutory requirements of the Act had been met, as claimed by appellee to be necessary for judicial approval and for the judgment to bar subsequent action, even assuming the correctness of the holding in the *Rogan* and other cases cited by appellee (p. 18-19) and the present contention of appellee as set forth above, and that appellee is barred by the position taken by it in the lower court from making any such contention at this time.

Needless to say, however, appellants do not agree with the holding in the *Rogan* case, for reasons set forth above (p. 13-5). Nor do appellants agree with the contention (p. 19) that consent judgments do not bar subsequent actions unless based upon stipulation or trial (see

Annotation 2 A.L.R. (2d) 514, at 526, citing *O'Cedar Corp. v. Woolworth Co.*, 66 F (2d) 363, cert. den. 291 U.S. 666) but contend the only questions as to the binding effect of consent judgments under the Fair Labor Standards Act (prior to the Portal Act) arose where it appeared that there was no bona fide dispute (*Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697) or that there had been a compromise of some question of law, such as of coverage under the Act (*D. A. Schulte, Inc. v. Gangi*, supra). See also Apts. Op. Br. pp. 42-44 and *Urbino v. Puerto Rico Ry. Light & Power Co.*, supra, at 14.

It is thus again submitted that, at the very most, the only "judicial scrutiny" required of a stipulation for entry of judgment for back wages under this Act *at that time* could have as to the three factors of jurisdiction, fact of consent and fraud, with the possible added factor whether there had been a compromise of some issue of law, and that upon finding these factors to be satisfied a court had both the power and the duty to enter judgment based on the stipulation—this without requiring either stipulation or proof as to the facts, although this additional alleged requirement was also satisfied in this case according to appellee's own representations to the trial court, as set forth above. Thus in *Fleming v. Salem Box Co.* (D. Or.) 38 F. Supp. 997, Judge Fee never inquired into any of the additional factors now urged by appellee.

As for appellee's further statement (P. 19) that it never retreated from its position that payments were to be conditioned upon entry of judgment, it should be noted that in the lower court appellee offered evidence

admitting that the amount of the proposed judgment was "agreed to be owing" (R. 98-99), joined with plaintiff in asking that such a judgment be entered, indicated its willingness that judgment be entered even as late as July 3, 1950 (R. 171) and while it has never paid the amounts "agreed to be owing" it never on the record denied liability therefor or objected to the entry of judgment as stipulated until it filed its brief in this Court.

5. *So-called "Analogies" urged by Appellee Fail to Support Power of Courts to Refuse to Enter Judgments on Stipulation under Fair Labor Standards Act, but Established Rules of Law Support Both Power and Duty to Enter such Judgments.*

Appellee next (pp. 20-22) contends that the refusal to enter judgments on stipulation under the Fair Labor Standards Act in the absence of proof or stipulation setting out the facts are supported by the following so-called "analogies": (1) that the Supreme Court of the United States may refuse to decide important cases involving complex issues arising on *summary judgment* based on affidavits and exhibits alone because of the "probable effect" of such a decision on other persons similarly situated, (2) that the courts may also refuse to decide important questions affecting third persons by declaratory judgment proceedings without detailed findings of fact, and (3) that consent judgments entered before any testimony has been taken are by express provision of the Anti Trust Laws distinguished from other judgments as to their use as *prima facie* evidence.

But the rules stated under these “analogies” rest on far different principles than those governing the entry of judgments on stipulation. Thus both summary judgments and declaratory judgments normally arise only in cases of *contested* litigation where one party is opposing entry of such a judgment and the judgment so entered will not only be binding on him over his protest but will also be regarded by the courts under the doctrine of *stare decisis* as a precedent controlling the merits of decisions in other similar cases involving other parties. On the other hand, a judgment entered on consent or stipulation, while binding on the parties, binds no one over his protest, because consented to, and has no standing as a precedent controlling the decision of other cases between other parties, at least as to the merits of the case, as to which there was no contest, since a decision is only authority for what it actually decides.

As for the admittedly even “more distant” analogy involving the distinction by provisions of Anti-Trust Laws between the effect of consent judgments “entered before any testimony has been taken” and other judgments, the only inferences that can properly be drawn are: (1) the recognition of a practice of entering consent judgments before and without taking any testimony whatever, and (2) an admission that in absence of express provision by statute such consent decrees would be regarded from the standpoint of *evidence* to the same effects as other judgments.

But appellee need not go so far afield for distant analogies. The well-established rules of law that it is the

duty of the courts to uphold agreements of settlement in the absence of fraud or mistake, without regard to what the result might or would have been had the parties chosen to litigate; that the parties to a pending case may stipulate to entry of judgment and agree on any legal disposition of a case and it is then the *duty* of the courts to enter judgment accordingly, and the spirit and provisions of Rule 68 of the Federal Rules of Civil Procedure furnish far more compelling precedents for requiring the entry of judgment in this case than any of the distant "analogies" relied upon by appellee (see Apts.' Op. Br. pp. 13-24). Moreover, the action of appellee itself in urging the entry of judgment in the lower court and in submitting a brief contending that a proper showing of facts had been made to support the entry of judgment on stipulation (App. A) speak more eloquently than any "analogy" and bars appellee from taking a contrary position to oppose the entry of judgment on appeal.

C. THE DISTRICT COURT ERRED IN REFUSING TO ENTER JUDGMENT AS STIPULATED.

Before considering the contentions of appellee that on December 20, 1946, the court did not err in refusing to enter judgment as stipulated it should be noted that appellee makes no attempt whatever to answer, and thus must be taken as in agreement with the points, authorities and arguments set forth in appellants' opening brief, pages 26 to 41. Yet the points considered by this portion of appellants' brief constituted the greater part of those relied upon by Judge Fee in his opinions

to support his position that he had no power to enter judgment based on stipulation in this case. If, as must be deemed admitted by appellee, these contentions by Judge Fee were completely untenable, it follows that by proceeding on such untenable theories in exercising what he considered to be discretionary powers, the dismissal of this cause by Judge Fee requires reversal on this ground alone. *United States v. Fischer*, supra.

1. *Jurisdiction was properly established in this case.*

Appellee contends (pp. 22-5) that jurisdiction was not properly established in this case for the reasons that diversity of citizenship was not proved; that the claims of appellants cannot be aggregated to satisfy the jurisdictional amount of \$3000; that sufficient facts were not shown by stipulation or otherwise to establish coverage under the Fair Labor Standards Act; that there were then doubts whether cost-plus-a-fixed-fee contractors were covered by the Act, and that the later decision in *Powell v. U. S. Cartridge Co.*, 339 U.S. 497, did not make erroneous the decision in this case on December 20, 1946.

Appellants will not repeat arguments set forth above (pp.11-2) demonstrating that the court had ample jurisdiction over this case as one arising under the Fair Labor Standards Act and to enter a consent decree therein. Also, while it is true that jurisdiction cannot be conferred by consent, it is established law that where jurisdiction depends upon facts, the parties may agree upon

facts which sustain jurisdiction. *Pitts. Cinn & St. Louis Ry. Co. v. Ramsey*, 89 U.S. 322, 327; *Harlee v. City of Gulfport*, 120 F (2d) 41, 43; *Murphy v. Sun Oil Co.*, 86 F (2d) 895, 896. It is thus significant that appellee in its brief to the lower court urged that it had ample jurisdiction to enter a consent decree in this case (Ap. 63 and 64) and that there had been an ample showing of facts by hearing, stipulation and admissions to establish coverage of the case under the Fair Labor Standards Act (Ap. 61 and 62).

It is also established law that where, as here, the court has general jurisdiction over the subject matter (as in a case arising under a law regulating commerce) a defendant who admits or does not object to jurisdiction will not be heard later to challenge such jurisdiction. *United States v. Kiles*, 70 F (2d) 880, 881; *Lambert v. Yellowley*, 4 F (2d) 915, 918, aff. 71 L. Ed. 422; *United States v. Edwards*, 23 F (2d) 477, 480; *William H. Perry Co. v. Klosters Aktie Bolag*, 152 Fed 967, 969; *Strauss v. U.S. Fidelity & Guaranty Co.*, 63 F (2d) 174, 179, cert. den. 77 L. Ed. 492; *O'Malley v. United States*, 128 F (2d) 676, 685; *United States v. Clarke*, 87 U.S. 92, 108. This is particularly true where, as here, defendant joined in asking that the trial court take jurisdiction of the case. *cf. Iselin v. LaCoste*, 147 F (2d) 791, 795; *In re Stevenson*, 45 F. Supp. 709, 711.

Appellee complains (p. 23) that insufficient facts were stipulated to show coverage under the Act upon the various questions raised by the Court. But the question of coverage under the Act goes to the ultimate

merits of the case and is entirely distinct from the initial question of jurisdiction, which depended solely upon whether the case arose under an act regulating commerce. And even if these questions of coverage went to the jurisdiction of the court, they were wholly satisfied by stipulations and representations of defendant that it was engaged in the production of goods for commerce and covered by the Act (App. 61) and that it could not deny but that each of plaintiffs spent at least some time each week in activities covered by the Act (App. 62). Again, having admitted such facts and having requested the Court to take jurisdiction, appellee cannot now be heard to the contrary.

As for the contention (p. 24) that on December 6, 1946, there was then a doubt whether such cost-plus contractors were covered by the Act—again the answer is that appellee represented to the trial court that its operations were covered by the Act (Ap. 61) and the later decision in *Powell v. U.S. Cartridge Co.*, supra, (which appellee admits (p. 25) is a “definite answer on this aspect of the coverage question”) must be taken as controlling over the decision of the trial court even on December 20, 1946, for the reason that on appeal the correctness of that decision is to be determined by the law as of the time of decision on appeal. *McClosky & Co. v. Eckart*, 164 F (2d) 257, 259.

2. “*Existence of a Claim*” was Adequately Established, Although not Necessary for Entry of Judgment on Stipulation.

Appellee next (p. 25) contends that entry of judgment on stipulation was properly refused because the “existence of a claim was not adequately established” in that it was not shown that each appellant worked 30 minutes in response to roll call requirements; that at best there was a conflict of testimony whether they worked from a few minutes to a maximum of 30 minutes which, “when rejected by the trial court”, does not constitute a factual basis for the existence of a valid claim; and that a settlement based on compromise of a claim “known to be invalid” is unenforceable.

In the first place, it is not clear on just what authority appellee contends that the “existence of a claim” is a proper factor to be considered on entry of judgment on stipulation. Appellee first admitted (p. 9) that as a general rule settlements will be upheld even though a different result might follow from a trial. The four factors upon which appellee claimed (p. 11) that proof is necessary before entry of such a judgment do not include “existence of a claim.” The alleged requirement (p. 17) of “judicial scrutiny” in Fair Labor Standards Act cases can, as shown above, mean only as to the factors of jurisdiction, fact of consent, fraud, and, at the most, the existence of a bona fide dispute and absence of compromise on any question of law, such as of coverage. Thus no basis has been established for this alleged additional requirement.

Next, while it is true that there was a conflict of testimony as to the exact amount of time worked by appellants, payment was to be made for 15 minutes each day,

instead of 30 minutes, as claimed by appellants, and appellee represented to the trial court that this conflict was typical of any case (Ap. 50) ; that their own witness estimated the time as varying from 5 to 30 minutes each day (Ap. 50) ; that there was a disputed question of fact as to the time worked (Ap. 56) ; that in reaching a settlement of this dispute under which appellants were to be paid for 15 minutes each day, with overtime and liquidated damages the parties “acted reasonably (and) fairly;” (Ap. 57) and that the Court had full power to enter judgment pursuant to the stipulation of settlement (Ap. 64). Furthermore, the Court did not reject the proposed settlement on this basis at all, but found that it was “fair and regular” (R. 105).

Indeed for appellee, in view of its own previous representations to the trial court, to now suggest to this court (p. 26) that the existence of a claim in this case was not adequately established and that this settlement was “based on the compromise of a claim known to be invalid” is not only shocking but typifies the complete reversal of position by appellee and the extent to which it is willing to go in order to defeat on appeal the entry of the same judgment as to which it once stipulated and which it joined in requesting in the trial court in order to make payment of amounts “agreed to be owing” (R. 98-99).

3. *The Settlement was Found to be Fair and Reasonable and thus Not Against the Public Interest.*

Appellee next (p. 26) contends in the same vein that facts supporting coverage were not offered to the satisfaction of the court and that refusal to approve the settlement was not error *if* it involved a compromise of coverage; that the court was also justified in rejecting the formula for settlement of the entire group of claimants in "wholesale manner" and that the public interest of the case was accentuated because the ultimate burden of the judgment would rest on the United States.

But, as we have seen (*supra*, 18) appellee had expressly represented that there was no dispute as to coverage and the existence of coverage was adequately shown, even if a proper factor for consideration in entry of a judgment on consent, which appellants deny. Moreover, appellee represented that the so-called "wholesale" formula used for settlement was entirely fair and reasonable under the circumstances (Ap. 57), and the court expressly found the settlement to be "fair and regular" (R. 105) and clearly did not reject the settlement because of the formula adopted by the parties, even if the fairness of the settlement was a proper factor for consideration, which appellants also deny.

As to the liability of the United States to make ultimate payment of any judgment, there are no facts of record in this case to make such a determination and the United States Attorney was careful to reserve the right to any such claim (R. 94). But since the United States Maritime Commission consented to the settlement and admitted that the amounts sought by judgment were "agreed to be owing" (R. 98-99) and since Congress

subsequently by the Portal-to-Portal Act, 29 U.S.C.A. sec. 253, expressly authorized and approved previous compromises of all actions under the Fair Labor Standards Act, so long only as there was a bona fide dispute as to the amount payable by the employer, which was clearly present here (as demonstrated below), there is no room left for argument that such a settlement can properly be rejected as not in the public interest (see also Apts. Op. Br. p. 45-6), even if this was also a proper factor for consideration on entry of judgment on stipulation, which appellants also deny.

II REPLY TO ARGUMENT THAT COURT DID NOT ERR IN DENYING MOTIONS FOR JUDGMENT ON STIPULATION, OR FOR SUMMARY JUDGMENT OR TO FILE SUPPLEMENTAL COMPLAINT.

A. REPLY TO ARGUMENT THAT MOTION FOR JUDGMENT ON STIPULATION PROPERLY DENIED.

1. *Rule 68, Fed. Rules Civ. Proc., is Applicable to this Case, at Least in Policy Therein Expressed.*

Appellee contends that Rule 68 is concerned only with costs and has no bearing on entry of a consent judgment, citing *Maguire v. Fed. Crop Ins. Corp.*, 181 F. (2d) 320. But even though, from the standpoint of the ordinary *defendant*, the purpose of Rule 68 is its effect upon costs, its important effect, so far as this case is concerned, is that regardless of the nature of the action,

whether under the Fair Labor Standards Act or not, and regardless of questions of jurisdiction, authority to compromise, fraud, existence of dispute or claim, and fairness or public interest, the parties are enabled by this rule, upon settlement of a pending case, to have judgment entered *automatically* by the clerk and without "judicial scrutiny" by the trial judge. Thus Rule 68 has *direct* bearing upon entry of a consent judgment and provides a procedure expressly suited for that purpose. The *Maguire* case involved an *unaccepted* offer of compromise. In this case, however, there was a consummated settlement and plaintiff then requested entry of judgment in the exact form to which defendant had stipulated. Thus both the provisions and the spirit of Rule 68 entitle plaintiff to the entry of such a judgment. (See also Apts.' Op. Br. 24)

2. *No Grounds Remained for Refusal to Enter Judgment.*

Appellee next (p. 28) repeats the same alleged grounds for refusal to enter judgment on motion for entry of judgment as urged as grounds for the previous refusal of the court to enter judgment. No purpose would be served by repeating arguments set forth above demonstrating that such claims as alleged lack of jurisdiction, alleged lack of a claim and alleged failure to meet the public interest never constituted grounds for refusal to enter judgment as stipulated by the parties. For the same reasons that such claims fail to sustain the decision of December 20, 1946, they likewise fail to sustain the decision of July 30, 1950, with the added reasons

that (1) During the interval the coverage of cost-plus contractors under the act had been made clear by the *Powell* decision, *supra*, and (2) Section 3 of the Portal-to-Portal Act (29 U.S.C.A. sec 253) expressly ratified all previous settlements of actions under the Fair Labor Standards Act, provided only that there was a "bona fide dispute as to the amounts payable;" which was clearly satisfied in this case for reasons set forth below and in appellants' opening brief (pp. 45-6).

Appellee contends (p. 29) that section 3 of the Portal-to-Portal Act applies so as to approve compromise settlements *only* if there are no disputes of law, such as over coverage. But in this case appellee conceded in the trial court that there was no dispute over coverage in this case, but only one over the amount of time worked (App. 18). Moreover, and of more importance, it is clear beyond doubt that section 3 was intended to sanction compromise settlements "if there exists a bona fide dispute as to the amount payable" regardless of whether arising from a dispute of law over coverage or one of fact as to the time worked, and at least in the later case, even though a dispute over coverage was also involved. See *Knudsen v. Lee & Simmons*, 89 F. Supp. 400, at 402 and *McClosky & Co. v. Eckart*, 164 F. (2d) 257, 259. Thus Rep. Walter, in explaining sec. 3 on behalf of the House Committee in charge of the bill, stated that

"It should be understood that the intent here is to permit compromises when there is a bona fide dispute as to the amount payable *based upon an issue*

of law, not only where the dispute is based upon issues of fact. In other words the intent is to permit a compromise where the dispute as to the amount due arises out of issues of law, such as coverage or exemptions, as well as issues of fact, such as the wage rate or hours worked" (93 Cong. Rec., [5-1-47] House, p. 4389).

See also "*The Portal-to-Portal Act of 1947*" (B.N.A., 1947) pp. 24-25; F-1-9 and F-5; and Apts' Op. Br. p. 46.

Appellee also states (p. 29) that the settlement in question violates provisions of section 3 requiring that settlements must require payment of not less than time and one-half the "minimum hourly wage rate" since in some cases the claimants agreed to accept "amounts less than the overtime wages *demanded*". But the above provision of section 3 clearly refers only to the *minimum* rate of 40 cents per hour then payable under the Act in question, here section 6 of the Fair Labor Standards Act. (See *Interpretation Bulletin, U. S. Dept. of Labor, "General Statement as to the Effect of the Portal-to-Portal Act of 1947"*, etc., issued Nov. 18, 1947, pp. 35-6.) But there never was any contention that this settlement involved any payments at rates less than the minimum of 40c per hour then effective under that Act and the settlement was computed at time and one-half the regular hourly rates for each of the employees involved for 15 minutes each day (App. 57) and such hourly rates ranged from 95c to \$1.20 per hour (see original complaint and supplemental complaint, also R. 61, 83 and 90). *Stillwell v. Hertz Drivursel Stations*, 174 F (2d) 714, cited by appellee, did not involve this problem in any way.

3. *The Portal-to-Portal Act Expressly Authorized and Ratified the Settlement in this Case.*

Coming now to what appellee apparently regards as the strongest point of its brief—the result of the Portal-to-Portal Act of 1947. Appellants are glad to accept the challenge of this as the “most glaring and overriding defect” claimed by appellee (p. 30), since if this charge proves false it follows that the remaining points made by appellee are regarded by it as having even less merit.

In substance, the contention of appellee is as follows (a) that section 2 of the Portal-to-Portal Act is an amendment to the Fair Labor Standards Act completely destroying all claims for compensation under that Act for “portal-to-portal” activities unless based on contract or custom, (b) that section 3 of the Portal-to-Portal Act, by limiting authorization and ratification of settlements to causes of action under the Fair Labor Standards Act *as amended*, extends only to settlements of causes of action other than those destroyed by section 2, (c) that therefore section 3 does not authorize or ratify settlement of claims for compensation for “portal-to-portal” activities, and (d) that this action involves such a claim, with the result that section 3 does not authorize or approve the settlement of this case, but on the contrary outlaws such a settlement.

The complete fallacy of this argument is apparent for two reasons:

(a) The reference in section 3 to causes of action un-

der the Fair Labor Standards Act “*as amended*” was to that Act as amended *prior* to passage of the Portal-to-Portal Act and not to any limitations imposed by section 2. (Cf. Sec. 3 with Sec. 2, 1 and 5; 29 U.S.C.A. Sec. 253, 252 and 216, as amended. Conf. Rep. No. 326 and House Rep. No. 71, 80th Cong. 1st Sess.)

- (b) It was not only intended that Section 3 authorize and ratify settlements of *any* cause of action or action under the Fair Labor Standards Act, but *it was expressly intended to authorize and ratify settlements of the very type of “portal-to-portal” claims outlawed by section 2* in the absence of such settlements. (See statement by Sen. Donnell, Cong. Rec. 80th Cong., 1st Sess. p. 2180; Cong. Rec. pp. 2127, 4388, 4389 and 4372; S. B. 70; H. B. 2157; S. R. 37, p. 47; S. R. 48, p. 46; H. R. 71; p. 8 and Conf. R. 326, 80th Cong. 1st Sess.) As stated by Sen. Donnell:

“We feel, however, that in the case of *these surprise liabilities, liabilities which industries did not expect, which neither management nor employees expected, it is entirely proper and is conducive to disposing of such cases with expedition and dispatch that there should be the power to make settlements, compromises, and releases or satisfaction of claims.*”

(93 Cong. Rec., [3-18-47] Senate, p. 2180.)

For a more detailed statement of the facts and

references in support of these two points see Appendix C of this brief.

It is thus clear beyond doubt that appellee's contention that section 3 does not authorize or approve settlement of "portal-to-portal" claims, is fully as false and without foundation as are the other contentions of appellee. Thus assuming, without admitting, that this case involves a "portal-to-portal" claim, the provisions of section 3 not only fail to exclude the settlement of such a case, as contended by appellee, but expressly authorize and ratify the settlement of such a case. Also, even though, as appellee contends (p. 32) the court was deprived of jurisdiction to award relief in a contested case involving a "portal-to-portal" claim outlawed by section 2 (such as in cases cited by appellee, p. 32), section 3 of the same Act expressly provides that a different rule shall be applicable to uncontested cases in which settlements have been reached. Thus section 3 (a) authorizes settlement of *any action* to enforce a cause of action under the F.L.S.A., including "portal-to-portal" claims, section 3 (d) expressly ratifies any and all previous compromises or settlement of such an action and section 3 (c) provides that any such compromise or settlement shall be a "complete satisfaction of such cause of action."

It is thus clear that section 3 limits the otherwise broad effects of section 2 and either reserves power in the courts to approve and enter judgments pursuant to the settlement of then-pending actions or authorizes the courts to do so, since the right conferred by section

3 to settle pending actions would be meaningless without power in the courts to enforce such settlements and to enter judgments pursuant to such settlements. To hold, as would be the necessary result of appellee's contentions, that even if then-pending actions could be subject to valid and enforceable settlements, the courts have no jurisdiction to enter judgments pursuant to such settlements or to otherwise enforce them would be "to infer Congressional idiosyncrasy" which is never proper, particularly where a "more sensible explanation" is available, as set forth above. Cf. *Keifer & Keifer v. R. F. C.*, 306 U.S. 381, 393.

Appellants state (p. 33) that a judgment is founded on "some antecedent obligation or contract", is only "higher evidence" of the contract (or obligation), but does not change its "essential character", so that in deciding how far it may be affected by legislation one "must look mainly to the original contract" (or obligation), citing *Blount v. Windley*, 95 U.S. 173, 176. Conversely, if the original contract or obligation was valid and unaffected by legislation, then no reason exists why judgment should not be entered as "higher evidence" of the original contract or obligation. Here, even prior to the Portal-to-Portal Act, settlements of disputes under the F.L.S.A. to pay for "portal-to-portal" work were valid, at least if within the limits of the *Schulte* and *O'Neil* cases. Under section 3 of the Portal-to-Portal Act such settlements were expressly authorized and ratified. Thus no reason exists under the rule of the *Blount* case why judgments should not be entered as "higher evidence" of such settlements.

Appellee next (p. 33) cites *Walling v. Miller*, 138 F (2d) 629, for the proposition that if a court does not have jurisdiction over a cause it lacks power to enter a consent decree. But since, for the reasons above stated, section 3 expressly authorizes settlements of then-pending actions for "portal-to-portal" claims, thus reserving jurisdiction over such actions, and since section 3 also "expressly sanctions" a stipulation of settlement in such a case, to use the language of the *Walling* case, it follows that the courts also have power to enter consent decrees as "higher evidence" of such stipulations of settlement.

From the foregoing it is clear that sec. 3 of the Portal-to-Portal Act completely validates all compromise settlements under the Fair Labor Standards Act made prior to May 14, 1947, including settlements of actions then pending under that Act, provided only (1) that there was a bona fide dispute as to the amount payable arising either from an issue of fact or of law, (2) that payments under the settlement were at rates not less than time and one-half the statutory minimum wage rate, and (3) that there was no fraud or duress. It also follows that the other so-called "requirements" contended for by appellee, such as "lack of a claim" and "failure to meet the public interest" are by the express provisions of section 3 completely eliminated as factors which can properly be considered in passing upon the validity of such settlements under the Fair Labor Standards Act. Since there can be no doubt but that the three requirements set forth above were satisfied in

this case, it must follow that the settlement and stipulation for judgment in this case have been ratified and approved by Act of Congress, with the result that it should likewise be approved by this Court by entry of judgment as previously stipulated and in the amount "agreed to be owing". It is submitted that any other result would do violence to both the spirit and express provisions of section 3.

B. REPLY TO ARGUMENT THAT MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

Appellee contends (p. 37) that lack of jurisdiction furnished a proper basis for denial of this motion. But for reasons stated above there was no lack of jurisdiction and denial of the motion was thus improper (See also Apts.' Br. 48).

C. REPLY TO ARGUMENT THAT MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT PROPERLY DENIED.

Appellee has devoted considerable space (pp. 37-43) to the question whether the trial court should have allowed the filing of a supplemental complaint, which is quite independent from and in no way controlling over the primary question whether the court should have entered judgment either originally upon the stipulation and joint request of the parties or subsequently upon motion of appellants. Indeed appellants are not so much concerned over the denial of their motion to file

a supplemental complaint, as such, as with the fact that the basis upon which Judge Fee rested his decision might be urged as a bar to recovery upon the compromise and settlement either by way of supplemental complaint or by later independent action or actions. For these reasons appellants are content to rest upon the arguments of their original brief in support of their right to file a supplemental complaint, as fortified by the further points and authorities set forth in Appendix D hereof, in answer to the contentions of appellee.

III. REPLY TO ARGUMENT THAT DISMISSAL FOR ALLEGED WANT OF PROSECUTION PROPER.

After stipulating to and jointly requesting entry of judgment for amounts "agreed to be owing" and after, on January 3, 1950, expressly disavowing any request that the case be dismissed for want of prosecution (R. 166) and even as late as July 3, 1950, reiterating to the trial court its willingness that such a judgment be entered (R. 171), appellee would now offer contentions that appellants did not exercise proper diligence and that dismissal for alleged want of prosecution was proper. Again appellants submit that appellee is barred by its position in the lower court from now taking such a position. But to consider the merits of the points raised by appellee in support of the dismissal of this case.

A. POWER OF THE DISTRICT COURT.

It must, of course, be conceded, as contended by appellee (p. 43), that the District Courts have inherent power to dismiss for want of prosecution. On the other hand, however, it must also be conceded by appellee that such power is not unlimited and that where improperly exercised or abused the District Courts will be reversed.

B. GROUNDS FOR REVERSAL FOR ABUSE OF DISCRETION.

It is true, as next contended by appellee (p. 44), that ordinarily the dismissal of a case for want of prosecution will not be reversed except in case of abuse of such discretion. On the other hand, appellants contend that on dismissal for alleged want of prosecution such discretion will be considered as having been abused: (1) When such a dismissal would defeat the ends of justice, as where it is admitted that a substantial amount is probably due (Apts.' Br. 53-6); (2) Where exercised upon an untenable theory, since discretion requires the discernment of the course prescribed by law (p. 53 and 70); (3) Where delays are excused or have been acquiesced in (p. 58-60); (4) after trial or where proceeding to trial would be futile (p. 60-2); (5) Where the case has been taken off the calendar, or has been reinstated after threatened dismissal and before the case has been reached again, or where the case is pending on motion (pp. 65-7); (6) Where delays have been caused by arrangements looking toward settlement (p. 68) or (7) Where there has been a stipulation for entry of judgment (p. 70).

Appellee has not denied that contentions (1), (2) (4) and (5) are proper and exist in this case. Since any one of such contentions is alone sufficient to demonstrate reversible error and since they all stand unrebutted in this case, it is submitted that these grounds alone require reversal of the action by Judge Fee in dismissing this case for alleged want of prosecution. In addition, appellee does not deny that presence of any of the remaining items (with the possible exception of item 7) would require reversal for abuse of discretion, although apparently denying their existence in this case. Now to discuss the points raised by appellee in contending that dismissal was not an abuse of discretion in this case.

C. REPLY TO ARGUMENT THAT NO ABUSE OF DISCRETION IN THIS CASE.

1. *The Ruling of January 3, 1950, is One Ground Demonstrating Abuse of Discretion.*

Appellee contends (p. 44-5) that simply because Judge Fee prefaced his then-stated decision not to dismiss the case of his own motion with the words "*I think*," his statement cannot be considered as a ruling. But whether or not a ruling was or was not made is not dependent on these words, but upon the entire frame of reference. A court will be deemed to have ruled on admissibility of evidence, for example, despite the fact that he may have said "*I think* that I shall overrule the objection," if he says no more and then allows the evidence to come in. Similarly, in this case, dismissal for

lack of prosecution had been suggested on Dec. 12, 1949 (R. 162-4) and appellants had on Dec. 19, 1949, filed an affidavit justifying the delays (R. 145) as well as motions for entry of judgment, etc. (R. 143). At the time of hearing on January 3, 1950, on the motions and before proceeding to argue them appellants first raised the specific question whether the court was satisfied that the case should not be dismissed for alleged lack of prosecution, calling attention to the affidavit and to the fact that appellee did not join in such a request for dismissal (R. 165-6). Not only did the Court then make the statement in question indicating his decision not to dismiss the case on his own motion, but then permitted argument on the merits of the motions presented, raised a further question on the merits on his own motion, stated that he would "*give you time to look this over*" and permitted the filing of briefs on that question (R. 166-170).

It is thus clear, taking the entire "frame of reference" into consideration, that Judge Fee ruled at that time that he would not dismiss the case on his own motion; that appellants and appellee both so understood at that time; that appellants, in reliance on this ruling, proceeded with argument on their motions, thus foregoing the opportunity to submit further testimony or other evidence explaining the delay or otherwise in opposition to such a dismissal and have thus been prejudiced, contrary to the suggestion of appellee (p. 45).

Appellants contend (p. 45) that even if the court be deemed to have made such a ruling he could later re-

verse himself. But appellee makes no attempt to dispute the statement in appellants' brief (p. 67) that :

"It is likewise generally held that once a case has been reinstated after dismissal for want of prosecution, it stands as though it had never been dismissed and it cannot, before being reached a second time, be dismissed for failure to prosecute. 27 C.J.S., Dismissal, p. 274-5."

A fortiori, where there was never a dismissal for want of prosecution, after a ruling that a case would not be so dismissed it cannot properly be dismissed before being reached a second time and while pending decision on motions submitted on argument and briefs. Appellee next (p. 46) states that the findings of the court are uncontroverted and support the dismissal. But the findings are more significant for the facts which they omit than for those included. Nor do they contradict in any way any of the same grounds stated above (p. 40), any one of which requires reversal of this case for abuse of discretion.

2. *The Delays in this Case were Fully Explained and Acquiesced in by Both Appellee and the Court.*

Appellee next (p. 46) contends that *some* of the delays were not excusable. As to this question appellants will not repeat the discussion of their opening brief (pp. 56-59) fully explaining all delays. Of more importance, however, is the fact that appellee makes no attempt to deny the further contentions of appellants' brief (p. 59-60) that where delay has been *acquiesced* in by de-

fendant a case should not be dismissed for lack of prosecution and that in this case all delays were fully acquiesced in both by appellee and by the court.

3. *Failure to Press for Trial no Ground for Dismissal Where Trial Would Have Been Futile.*

Appellee, without challenging the proposition that dismissal for want of prosecution is improper where a trial would be futile (Ap. Br. 60) or that a trial in this case would have been completely futile in view of the decision by Judge Fee in December, 1946, (Id. p. 61-2), nevertheless contends (pp. 48-50) that appellants should have attempted to have the case set down for trial and urge that failure to do so was "an omen of lack of diligence." But since appellee itself contends (p. 50) that the question whether judgment should be entered on the stipulation would only present matters "already decided against the appellants" and that a trial on the merits of the original claim was barred by the Portal-to-Portal Act, it is obvious from appellee's own view of the matter that a trial on either question would have been completely futile, so far as the trial court was concerned. Thus failure to proceed to trial in this case, instead of showing lack of diligence, reflected only a realization of the futility of the situation. Since trial would thus have been admittedly futile, the uncontroverted rule that in such a case dismissal for want of prosecution is improper requires reversal of the dismissal of this case on this ground and review by this Court of the merits of questions decided by Judge Fee.

The final contention by appellee (p. 50) is that the Portal-to-Portal Act destroyed the basis of appellants' original claim, in absence of amendment satisfying the requirements of section 2 of that Act and that "the non-existence of a meritorious claim is of added weight in favor of the propriety of a dismissal for want of prosecution." But the passage of that Act imposed no affirmative duty on litigants to amend *unless* they elected to proceed on the merits of their original claim under the Fair Labor Standards Act. On the other hand, where, as here, plaintiffs had agreed upon a compromise and settlement, with stipulation for entry of judgment, they were entitled to elect not to proceed on the merits of their original claim and, in fact, may well have been unable to satisfy the requirements of section 2 in order to do so. Thus in such a case plaintiffs were fully entitled to and did at least upon passage of the Portal Act, elect to stand on their settlement and to continue to seek entry of judgment thereon particularly since as demonstrated above, section 3 of that Act expressly authorized and ratified the very basis upon which appellants in this case originally sought entry of judgment—namely, by authorizing and ratifying settlements of such previously existing actions.

It follows that instead of having a non-meritorious claim as contended by appellee (p. 50) appellants have a *meritorious* claim, particularly since appellee stipulated to the entry of judgment and had offered evidence admitting the sums involved were "agreed to be owing" (R. 98-9). Therefore the converse of the rule suggested by appellee (p. 53-4) is applicable to this case and the

uncontroverted rule that a case should not be dismissed for lack of prosecution where it appears "that a substantial amount was probably due" (Apts. Br. 54) furnishes a final compelling reason for holding that the trial court abused its discretion in dismissing this case.

CONCLUSION

For the reasons set forth above it is submitted that the decision of the lower court should be reversed and that judgment should now be entered by this Court as stipulated by the parties and "agreed to be owing," with interest thereon.

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

(Title of Case Omitted.)

DEFENDANT'S MEMORANDUM IN SUPPORT OF
PROPOSED SETTLEMENT

I

INTRODUCTORY STATEMENT

This memorandum is submitted for the consideration of the Court pursuant to the proceedings had in the above matter on May 13, 1946, at which time the Court raised the question as to whether, in view of the opinion issued by the Supreme Court of the United States on April 29, 1946, in deciding the case entitled "*D. A. Schulte, Inc. v. Salvatore Gangi, Etc.*" (14 U.S. Law Week 4339), the Court had power to enter a judgment pursuant to the stipulation of the parties in the present case.

The defendant respectfully submits that under the circumstances of the present case this Court has full power to approve the settlement and to make and enter a judgment pursuant to the stipulation of the parties. In support of that position, the defendant submits the following considerations.

II

THE FACTUAL SITUATION

By the complaint and supplemental complaint in this case, 52 men who were employed as guards at the Swan Island shipyard of the defendant seek to recover on the claim that each of them was required to report for roll call, inspection and other duties thirty minutes in advance of going on patrol on their beat, and that this time was not included by the defendant in making its wage payments. The complaint was filed on December 8, 1945 and the supplemental complaint was filed on January 30, 1946. Thereafter, defendant filed a general denial of the plaintiffs' claims.

On April 19, 1946 a stipulation for judgment was presented to the Court with a request that judgment be entered pursuant to said stipulation. The stipulation covered 50 of the 52 claimants and recited that certain questions of fact and law had arisen with respect to the claims of the plaintiffs, these recitals being set forth in paragraph 4 of the stipulation, which reads as follows:

“Questions of fact and of law have arisen with respect to the claims of plaintiffs against defendant referred to in the complaint and the supplemental complaint herein regarding: (1) the number of hours, if any, in excess of forty (40) hours per week worked by plaintiffs, and each of them, for defendant; (2) the amount of time, if any, which plaintiffs, and each of them, were compelled to spend in reporting for roll call, inspection, and other duties before or after the time spent in the performance of their regular duties as described in Paragraph

IV of the complaint; (3) whether such time was time worked within the meaning of the Act; and (4) whether the nature of the work performed by plaintiffs was such as to entitle them to the benefits of the Act;”

The stipulation then went on to recite that a bona fide controversy and dispute existed by reason of the matters just mentioned, between the parties with respect to the right of the plaintiffs to collect and receive and the obligation of the defendant to pay overtime compensation, liquidated damages, attorneys’ fees and costs under the provisions of the Fair Labor Standards Act; that the parties desired to settle and adjust this controversy and dispute in the manner provided in the stipulation and to agree upon the payments to be made to plaintiffs and their attorneys by defendant in full settlement and discharge of all of the claims of plaintiffs set forth in the complaint. Following these recitals, the stipulation provided that judgment should be entered by the Court in favor of the plaintiffs and against the defendant in the amounts stated on a schedule attached to the stipulation, which payments were to be in full satisfaction and discharge of all liability of the defendant to the plaintiffs under the Fair Labor Standards Act. There was a further provision for the payment of attorneys’ fees and costs.

Hearings were held before this Court on April 19th and 22nd, 1946, at which hearings a number of the plaintiffs testified, as well as an employee of the defendant who advised the Court of the defendant’s position with respect to the settlement.

In view of the fact that the defendant's operations were carried on under contracts with the United States Maritime Commission and that the amount of the judgment is subject to a claim for reimbursement by the defendant from the Government, the United States Attorney for the District of Oregon also appeared at the hearings and participated therein.

The testimony given at the hearings was typical of that which is to be expected in any litigation. The plaintiffs who testified stated that they were required to report one-half hour early every day during their employment for the purpose of roll call, inspection and other preliminary duties; although one of these witnesses conceded that for a time at least the periods required for the roll call and inspection might have been less than one-half hour. (All emphasis supplied.)

The testimony of defendant's representative, Mr. W. L. Tuson, contradicted the assertion of plaintiffs that they reported one-half hour early during every day of their employment. Mr. Tuson stated that originally the guards had been instructed to report one-half hour early, but that in actual practice this rule was not enforced, that the time was gradually cut down, and that in fact many guards reported simply at the beginning of the shift, or even reported late for work. He indicated that the time required for the roll call was a varying figure, running from five minutes to thirty minutes. Furthermore, Mr. Tuson testified that there were no existing records from which an exact determination of the time spent by the plaintiffs for roll call and inspection could be made at the present time.

At the conclusion of the hearings, *plaintiffs' attorneys indicated that all of the plaintiffs covered by the stipulation who had not appeared and testified had authorized the settlement provided for in the stipulation and would testify to substantially the same effect as the plaintiffs who took the witness stand.*

The Court thereupon took the matter under consideration and subsequently, on May 13, 1946, called upon the attorneys for the respective parties to appear, at which time the court stated that the testimony had indicated that the transaction between the parties was fair and regular and an appropriate settlement was arrived at which the Court would approve without question were it not for the problem as to whether, in the light of the Supreme Court's decision in the *Schulte* case, *supra*, the Court had power to approve the settlement.

We turn, then, to a consideration of the principles established by the Supreme Court in the *Schulte* case and the application, if any, of those principles to the present case.

III

THE PRINCIPLES OF THE SCHULTE CASE

The issue presented to the Supreme Court for decision in the *Schulte* case is stated by the Court in the following language:

“The primary issue presented by the petition for

certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute *over the coverage* of the Act on a claim for overtime compensation and liquidated damages where the employees receive the overtime compensation in full.”¹

After reviewing the proceedings in the District Court and the Circuit Court of Appeals and stating the facts of the case, the Supreme Court proceeded to pass upon the issue stated above. It first held that it was unnecessary to determine whether the liability for unpaid wages and liquidated damages was unitary or divisible, stating that whether the liability was single or dual—

“ . . . we think the remedy of liquidated damages cannot be bargained away by bona fide settlements of *disputes over coverage*. Nor do we need to consider here the possibility of compromise in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment.”

The Court then went on to say that the reasons which led it to its conclusion with respect to “compromises of real *disputes over coverage*” do not differ greatly from those set forth in its decision in *Brooklyn Savings Bank v. O’Neil* (1945), 324 U.S. 697, and after quoting from the *O’Neil* case the Court continued:

“In a bona fide adjustment *on coverage*, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. . . .”

¹ Underscoring ours unless otherwise noted.

Again, in the next and final paragraph of the Court's decision on this issue, the Court stated that it thought the purposes of the Act led to the conclusion "that neither wages nor the damages for withholding them are capable of reduction by compromise of *controversies over coverage*."

From the foregoing quotations it is plain that the issue before the Supreme Court in the *Schulte* case was whether a dispute as to coverage (i.e., the application of the overtime provisions of the Act to particular employees) could be the subject of a valid settlement or compromise. The Court expressly recognized this limitation in its own statement of the issue, as noted above, and repeatedly referred to "disputes over coverage", "bona fide adjustments on coverage", and "controversies over coverage". Most important of all, by its language the Court expressly excepted from the application of its decision cases involving a factual issue, "such as a dispute over *the number of hours worked* or the regular rate of employment."

It must be noted, too, that in Footnote 8 of the Opinion, the Court summarized certain contentions made by the employer (the petitioner) and in that connection had the following to say:

"Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. *North Shore Corporation v. Barnett et al.*, 323 U.S. 679.

"Petitioner draws the inference that bona fide

stipulated judgments on alleged Wage-Hour violations for less than the amount actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, *we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties.* At any rate the suggestion of petitioner is argumentative only as no judgment was entered in this case."

The statement of the Court with respect to the distinction between compromises by the parties and settlements of controversies by stipulated judgment is important in view of the fact that in the *Schulte* case the facts involved a situation in which the employer and the employees had gotten together and arrived at an agreement, pursuant to which the employer paid overtime compensation in consideration of a general release. Here, on the other hand, suit has been filed, the defendant has entered its denial, extensive negotiations between the attorneys for the parties has ensued, and ultimately a stipulation for judgment has been agreed to which has been submitted to the Court for judicial scrutiny.

Bearing in mind the fact that *the Supreme Court by its very language limits the principles of the Schulte decision to disputes over coverage, recognizes that disputes over hours worked or regular rate of pay involve different considerations and that cases involving re-*

leases negotiated between the parties are to be distinguished from cases involving stipulated judgments requiring the pleading of the issues and submitting the judgment to judicial scrutiny, we now turn to the question as to whether the *Schulte* decision is applicable in the present case so as to deny the power of this Court to approve a settlement which it has stated to be fair and regular.

IV

THE SCHULTE DECISION DOES NOT DEPRIVE THE COURT OF JURISDICTION TO APPROVE THE SETTLEMENT INVOLVED IN THE PRESENT CASE.

A dispute over coverage involves the issue as to whether or not a particular employee is doing work of such a character as to entitle him to the benefits of the Fair Labor Standards Act. In the *Schulte* decision, the Supreme Court has said that a dispute of that character cannot be the subject of a compromise, even though the employer acts in good faith in disputing the application of the Act. It is plain that there can be differences of opinion with respect to the soundness of the Court's ruling that a bona fide dispute with respect to coverage cannot be the subject of a compromise; no better evidence need be suggested than the fact that the trial court, one of the Justices of the Circuit Court of Appeals, and the late Chief Justice and two of the Associate Justices of the Supreme Court took a view contrary to that of the Court's majority. Be that as it may, the majority's decision is now the law. The question here

is whether the view of the majority applies to the present case.

We respectfully submit that the principles of the Schulte case have no application to the present case. We believe that the testimony which this Court heard on April 19th and 22nd made it abundantly clear that the real issue here is "a dispute over the number of hours worked." The testimony of the plaintiffs indicated that they assert that they were required to report for roll call one-half hour in advance of the commencement of their regular shift on each day that they worked. The testimony of defendant's representative controverted the plaintiffs' claim, and he asserted that the time ran from five minutes to thirty minutes. Here, as in practically every other law suit, was a disputed question of fact.

This dispute is something entirely different from a dispute with respect to the application of a law enacted by Congress. A dispute over coverage amounts to a denial of the existence of rights created by statutory enactment. Inasmuch as the Fair Labor Standards Act was enacted by Congress for the purpose of ensuring certain minimum compensation to workers, we recognize the validity of the Supreme Court's view that an employer cannot deny to his employees the rights which Congress has said they shall have by disputing, even in good faith, the application of the statutory benefits to particular employees. On the other hand, *we find nothing in the Fair Labor Standards Act or in the Supreme Court's decision in the O'Neil and Schulte*

cases indicating that the parties cannot sit down together and reach an agreement on disputed facts with respect to the measure of the plaintiffs' rights and the defendant's obligation to pay overtime.

In the present case, as Mr. Tuson testified, the amounts provided to be paid under the stipulation and the proposed judgment are based upon a computation which allows one-half hour per day at straight time or time and one-half, dependent on whether the additional time allowed threw the work week over 40 hours. To put it another way, what the parties have actually agreed to is the allowance of fifteen minutes time with the time and one half doubled so as to include both the overtime and the liquidated damages. *In effect, then, the parties have agreed that the plaintiffs shall be paid for fifteen minutes each day and shall receive overtime and liquidated damages based upon such time allowance. Bearing in mind the conflicting claims of the parties with respect to the measurement of the time and the lack of records which would obviously fix the time involved each day, we submit that the parties have acted reasonably, fairly, and in the interest of conserving the Court's time in entering into a stipulation fixing the amount to be recovered by the plaintiffs.*

We believe that the Supreme Court meant to preserve to the parties the right to enter into compromises with respect to "the number of hours worked or the regular rate of employment" when it said that such compromises were not considered in arriving at its conclusion that "disputes over coverage" could not be the subject

of a bona fide settlement. Throughout its decision, the Court time and again limits the language of the decision to disputes or controversies with respect to coverage.

We believe it is one thing to say that an employer cannot bargain with his employees as to whether or not the employees are within the inclusion of a Congressional act, but that it is something entirely different to say that, *conceding the application of the Act*, the parties cannot agree among themselves regarding the number of hours worked or the regular rate of pay. For example, suppose an employer paid an employee a specified amount per hour and also furnished room and board to him. If the employee worked in excess of 40 hours per week, then under the rulings of the Wage and Hour Division the value of the room and board must be taken into consideration in determining the regular rate of pay on the basis of which overtime is to be computed. The employer may claim that the board and lodging is worth \$30.00 a month while the employee, with the hope of increasing the amount of his overtime, may assert that the board and lodging is worth \$60.00 a month. Here, as we see it, there is no question of trifling with or attempting to evade the mandate of Congress; there is a simple issue as to the monetary value of the board and lodging. We cannot believe that in such a case the Supreme Court intended to say that the parties could not finally agree that the value of the board and lodging was \$45.00 a month or \$35.00 a month, and base their computation of the regular rate of pay on such an agreement.

Again, let us take a case involving the portal-to-portal principle. Suppose the employee contends that the time required to travel from the main entrance to the face of his shift is twenty minutes at the beginning of the shift and also at the end of the shift, while the employer insists that the allowable time is ten minutes. *We cannot believe that the Supreme Court intended to say that the parties could not, in connection with pending litigation, arrive at a settlement based on a time allowance of fifteen minutes at the beginning and at the end of the shift.*

In other words, as the Court itself recognized, we submit that there is a plain and obvious distinction between the settlement of an issue as to coverage and the settlement of an issue as to hours worked or regular rate of pay. A dispute as to coverage involves a denial of the rights which Congress has provided; on the other hand, a dispute as to hours worked or regular rate of pay recognizes the existence of the rights created by statute and involves only the question as to the measure of those rights. *We submit, most respectfully, that this Court should not extend the doctrine of the Schulte case beyond the scope which the Supreme Court has laid down.* As we noted in our analysis of the Supreme Court's opinion, that court expressly stated that in arriving at its conclusion it was considering only the validity of settlements of disputes over coverage and was not considering "the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment." Furthermore, in the footnote to which we have referred above, the Court plainly indicated that it was

considering only a case where a settlement had been worked out directly between the parties and was not considering the case in which an action was commenced, the issues were joined, and then a stipulation for judgment was submitted "to judicial scrutiny".

Thus, there are two basic, fundamental differences between the situation presented to the Supreme Court in the Schulte case and the situation presented to this Court in the present case. In the first place, this case involves actual litigation in which the issues have been pleaded and a stipulation for entry of judgment has been submitted to the Court for its consideration and approval after both parties presented evidence with respect to the merits of the settlement. Secondly, it is apparent that in final analysis the issue here is one of fact with respect to the number of hours worked, as distinguished from a dispute over coverage. So that there may be no question on the latter point, we turn for a moment to the consideration of a portion of the transcript in the present case.

V

THIS CASE DOES NOT INVOLVE A DISPUTE OVER COVERAGE

At the conclusion of the hearing on April 22nd, this Court made inquiry of counsel for defendant as to whether there was any question but that the defendant was engaged in the production of goods for commerce and therefore fell within the terms of the Fair Labor

Standards Act. In response to the Court's inquiry, Mr. Rockwood, of counsel for defendant, stated that some of the guards were working in barracks, dormitory and cafeteria areas, outside the shipyard proper, and that there was a dispute between the parties as to whether the guards in such positions were engaged in commerce or the production of goods for commerce. However, Mr. Rockwood went on to state that the individual guards, with few exceptions, were on various posts throughout their period of employment; indicating, in other words, that the guards rotated from one post to another. In this connection Mr. Rockwood stated "a guard one day might be working inside the fence, along the ways, we will say. Another day, that same guard might be working over in Mock's Bottom, near the parking lot, outside the fence, and another day he might be working on some other post." In response to a further question by the Court, *Mr. Rockwood stated that there was no question about the main proposition that the Company was in a position placing it within the provisions of the Fair Labor Standards Act.*

At the proceedings on May 13, 1946, this Court referred to the foregoing portion of the transcript and raised the question as to whether these statements of counsel for the defendant injected an issue with respect to coverage into this case.

We submit that upon analysis the statements do not present an issue with respect to coverage. It was conceded that the Company itself was engaged in commerce or the production of goods for commerce so that

its operations fell within the coverage of the Fair Labor Standards Act. The particular situation to which Mr. Rockwood referred was the question as to whether the fact that a guard, in the course of rotation from post to post, worked one day inside the shipyard fence (concededly engaged in the production of goods for commerce) and another day worked outside the fence (possibly not engaged in the production of goods for commerce) destroyed the guard's rights under the Act during the time spent outside the shipyard proper.

Since the proceedings of May 13, 1946, an investigation has been made in an effort to determine whether any of the plaintiffs in the present action spent a full work week in beyond the fence activities, and no such case has been discovered. It must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are no facts with respect to the plaintiffs here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, and defendant therefore waives any such point which may have been raised by the remarks of its counsel which were referred to by the Court.

The ultimate fact is that the real dispute in this case relates to the amount of time which the plaintiffs were required to spend in reporting for roll call and inspec-

tion. That is a factual question on which the parties have agreed by their stipulation.

If the Court deems it necessary that the record be clarified, defendant respectfully suggests that the parties be permitted to amend Paragraph 4 of their stipulation by confining their statement of the controversy to what is basically the issue of the case, namely, the hours worked by the plaintiffs. We are confident that plaintiffs' counsel would readily join with us in such an amendment if it is necessary to clear the record.

VI

CONCLUSION—THE COURT HAS THE POWER TO ENTER JUDGMENT PURSUANT TO THE STIPULATION OF THE PARTIES IN THE PRESENT CASE

Inasmuch as the Supreme Court's decision in the *Schulte* case is limited to non-judicial settlements of disputes over coverage, we earnestly submit that that decision has no application to the present case. Here, the real issue between the parties is an issue of fact as to the hours worked. The parties have, after lengthy negotiations, agreed to the entry of a judgment based on an agreement with respect to the hours worked. *The proposed settlement is one which the Court has characterized as "fair and regular" and which would be approved without question were it not for the problem as to whether the Supreme Court's decision in the Schulte*

case has removed this Court's power to approve the settlement. In view of the limitations which the Supreme Court has imposed upon the principles announced in the Schulte decision, we respectfully submit that this Court still has full power to enter judgment pursuant to the stipulation of the parties.

Should the Court, notwithstanding the briefs of the parties, still have doubt with respect to its power in the premises, we respectfully request an opportunity to argue the matter at a time convenient to the Court.

Respectfully submitted,

FLETCHER ROCKWOOD

HART, SPENCER, McCULLOCH & ROCKWOOD

Attorneys for Defendant

GORDON JOHNSON

THELEN, MARRIN, JOHNSON & BRIDGES

Of Counsel for Defendant

APPENDIX B

CASES CITED BY APPELLEE RE STIPULATIONS FOR ENTRY
OF JUDGMENTS

(1) *West v. Bk. of Commerce & Trusts*, 167 F(2d) 664,6, held only that where an attorney for a city does not have authority to consent to entry of judgment such a judgment is not binding upon the city, particularly where the attorney attempted to stipulate with respect to the validity of a statute or ordinance. But in the usual case, as in this case, no question of authority to consent is involved and no attempt to stipulate upon the validity of a statute.

(2) *Hot Springs Coal Co. v. Miller*, 107 F (2d) 677, affirmed the entry of a judgment on stipulation by the trial court. Although it was not held that the courts have a duty to enter such judgments, neither was it held that the courts may disregard stipulations for entry of judgments and the effect of the decision was to approve the entry of such a judgment.

(3) *Rogan v. Essex County News Co. Inc.*, 65 F. Supp. 82, was a lower court decision refusing to enter judgment based on stipulation in 1946 upon the ground that under *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, rights under the Fair Labor Standards Act could not be waived except upon clear showing that statutory requirements were satisfied, and that there was a "complete absence of such a showing." The case was decided in 1946 before the Portal-to-Portal Act was adopted

to expressly permit such settlements and in this case there was a clear showing that former requirements were also satisfied. (See opening brief pp. 41-6.)

(4) *United States v. R.C.A.*, 46 F. Supp. 654, involved a consent decree for an injunction, in which equitable powers and duties of the courts involve different considerations than in an action at law. Although it was held that such consent decrees could be set aside upon a showing of lack of consent, fraud, or lack of jurisdiction, the effect of the decision was to leave undisturbed the consent decree involved.

(5) *McLeod v. Hyman* (Pa.) 116 At. 535, did not involve the entry of a judgment based on stipulation, but only the setting aside of some procedural stipulation in an attachment case, the exact effect of which is not clear.

(6) *Everett v. Cutler Mills* (R.I.) 160 At. 924, did not involve the original entry of a judgment based on stipulation, but only the question whether such a judgment would be set aside upon proof that it was entered under mistake of fact.

(7) *Kidd v. McMillan* (Ala.), 21 Ala. 325, also did not involve the original entry of judgment based on stipulation, but only the question whether a judgment, once entered, would be set aside after the end of the term on stipulation of the parties.

(8) *Merrill v. Batchelder* (Cal.) 56 Pac. 618, involved primarily a question whether an attorney was author-

ized to stipulate for the entry of judgment and the judgment so entered was not disturbed. See the later case of *Capitol Mt. Bk. v. Smith*, (Cal.) 144 P (2d) 665, 669, 673-4.

(9) *Automobile Ins. Co. v. United States*, 10 F.R.D. 489, was a decision by Judge Fee himself holding that under the Federal Tort Claims Act a stipulation for entry of Judgment will not be approved without a complete pre-trial conference, trial, findings of fact and conclusions of law "the same as any other civil action." Since that act specifically imposes on the District Courts the affirmative duty to approve compromises and settlements of tort claims against the government—a requirement which does not exist in absence of statute and which was not included in the Fair Labor Standards Act—the case is clearly distinguishable from this case.

APPENDIX C

ANALYSIS OF PROVISIONS AND INTENT OF SECTION 3 OF PORTAL-TO-PORTAL ACT

1. The reference of Section 3 of the Portal-to-Portal Act to the Fair Labor Standards Act, *as amended*, was to that act as *previously* amended rather than to any new limitations imposed by section 2.

(a) The Fair Labor Standards Act had previously been amended several times. See, for example, 29 U.S.C. A. Sec. 206, 207, 209 and 211. The usual reference to an Act that has been previously amended is to that act "as amended". If section 3 intended to exclude claims barred under section 2 it would have made specific reference to sec. 2 and not make general reference only to the F.L.S.A. "as amended."

(b) Reference in other sections of the Portal-to-Portal Act, *including section 2 itself*, to the Fair Labor Standards Act "as amended" make clear that the same reference in section 3 was to *previous* amendments, and not to any claimed amendment as a result of section 2. (See 29 U.S.C.A. sec. 251 (a); 252 (a), (c), (d) and (e); 254 (a) and (d), 255, 256, 257, 258, 259, 260, 261 and 262). If references in other sections to the F.L.S.A. "as amended" meant as changed by section 2, the results would be absurd. (See for example, 29 U.S.C.A. sec. 251 (a) referring to the F.L.S.A. "as amended" as having been in the past "judicially interpreted.")

(c) While some other sections of the Portal-to-Portal Act were intended and phrased as amendments to the Fair Labor Standards Act (see sec. 5 of original Portal-to-Portal Act, H. B. 2157, 80th Congress, 1st session, and 29 U.S.C.A., sec. 216 (b) and (c), as thus amended), the remaining sections, including section 2, were not enacted as amendments to the Fair Labor Standards Act, but as a separate Act entitled the Portal-to-Portal Act of 1947. That Congress made such a distinction between provisions of that Act shows further that the reference in section 3 to the F.L.S.A. "as amended" was not intended to refer any limitations imposed by sec. 2 of the same Act.

(d) Congressional Reports discussing section 3 do not refer to claims under the F.L.S.A., *as amended*, but to *any* action under that Act (see Conference Report No. 326 and House Report No. 71, 80th Cong., 1st Session).

2. It was not only intended that section 3 authorize and ratify settlements of *any* cause of action or actions under the Fair Labor Standards Act, but *it was expressly intended to authorize and ratify settlements of the very type of "portal-to-portal" claims outlawed by section 2* in the absence of such settlements.

(a) Although we do not have available copies of the original proposed statutes (S. B. 70 and original draft of H. B. 2157, 80th Cong., 1st session), house and senate reports indicate clearly that the provisions of the senate version of those bills relating to compromises and settle-

ments were expressly limited to the same types of portal-to-portal claims otherwise destroyed by other provisions of the same acts (see S. R. 37, p. 47, and S. R. 48, p. 46, referring to "all *such* claims." See also Cong. Rec. 80th Cong., 1st session, p. 2376 with text of sec. 4 (d) and (e) as passed by senate). This is further indicated by the Senate amendment that settlements of such claims must provide that the proceeds be distributed among the real parties in interest to such claims (a limitation later abandoned).

(b) Senator Donnell, in presenting the Senate Report on that early version of the Act, stated, after reference to portal-to-portal claims, that

"We feel, however, that in the case of these surprise liabilities, liabilities which industries did not expect, which neither management nor employees expected, it is entirely proper and is conducive to disposing of such cases with expedition and dispatch that there should be the power to make settlements, compromises, and releases or satisfaction of claims."

(93 Cong. Rec., [3-18-47] p. 2180.)

Senator Donnell also stated that the Act was not intended to interfere with any rights under contract (Id., p. 2127) which might involve constitutional questions, as might result if rights under settlements were impaired.

(c) House Report 71, apparently referring to the corresponding section of the original H. R. 2157, states at

p. 8 that "section 2 (b) provides that *any* claim, cause of action or action may be settled . . ." Apparently this view was adopted in the final Act, since section 3 (a) of the final Act refers without limitation for compromises of "*any* cause of action" under the F.L.S.A. (as amended), to "*any* action" to enforce such a cause of action and in section 3 (d) to "*any* compromise" theretofore made. (See 29 U.S.C.A. sec. 253 (a) and (d). Since, as demonstrated above, the phrase "as amended" cannot be regarded as a limitation, the effect of this language is to include not only "portal-to-portal" claims, as contemplated under earlier versions of the Act, but *any* claims theretofore accrued under the F.L.S.A.

(d) The fact that section 3 is limited to claims *therefore accrued* under the F.L.S.A. and *not* made applicable to claims *later arising* further supports the view that section 3 was intended largely to enable then existing portal-to-portal claims to be disposed of by settlement, in accordance with the statement of Sen. Donnell.

(e) Discussion of the final act on the floor of Congress makes further plain that Congress did not abandon its original intent (as stated by Sen. Donnell) that section 3 authorize and ratify settlement of portal-to-portal claims, but if anything expanded the application of section 3. Thus Sen. Gwynne, in explaining the conference report (No. 363) stated that "There is also a provision in this bill which allows the settlement and compromise of *all claims* under these three acts in existence at the time the law becomes effective" (93 Cong.

Rec., supra, p. 4388). Rep. Walter, in explaining provisions of the bill in the house relating to compromises made no limitation as to the types of claims involved, so long as there was a "bona fide dispute" upon either an issue of law or fact (Id. 4389). Objections by Sen. McGrath on the day of final passage in the Senate that these provisions might be abused by government contractors in settlements of "portal-to-portal" claims were unheeded (Id. 4372). (See also "The Portal-to-Portal Act of 1947" [B.N.A.], supra.)

APPENDIX D

POINTS AND AUTHORITIES RE FILING OF SUPPLEMENTAL COMPLAINT

Agreements of compromise and settlement are enforceable in the courts. *Brown v. Spotford*, 95 U.S. 474, 483 and Apts.' Op. Br. p. 13-17. The supplemental complaint alleges that "the parties hereto agreed upon a compromise and settlement of this cause", together with facts qualifying under section 3 of the Portal-to-Portal Act (R. 157-8). It is therefore submitted that a claim is stated upon which relief can be granted.

It should not be necessary to repeat arguments set forth above to disprove appellee's contentions (pp. 37-8) that the limitations of section 2 of the Act have no bearing on such compromises; that the compromise in this case satisfies the requirements of section 3. Even though section 3 may not create a new cause of action based on compromise, it recognizes that there may be a valid compromise and settlement of a "portal-to-portal" claim and such a compromise and settlement, if valid, is enforceable. *McClosky v. Eckart*, supra, cited by appellee (p. 38) is not to the contrary, but at p. 259 lends support to this view.

Appellee next contends that a stipulation for judgment is not a contract, but the authorities cited (p. 39) hold only that a *judgment* on stipulation is not a contract. It is submitted, on the contrary, that a stipulation for judgment is a contract as between the parties and

the fact that it may require approval of the court by entry of judgment does not establish the contrary since all stipulations are contracts as between the parties, even though they may require court approval. (See Apt.' Op. Br. pp. 20-23 and see *In re Morris Metal Products Corp.*, 4 F (2d) 1003, cert. den. 267 U.S. 601, defining the term "stipulation" as an *agreement* between counsel respecting business before the court." But regardless of whether a stipulation for entry of judgment may or may not be a contract and that any breach was by the court, not by appellee, as contended by appellee (p. 39) the allegations of the supplemental complaint in this case are not limited to the stipulation for judgment and allege, generally, an unqualified agreement of compromise and settlement and the failure of appellee to make the payments agreed upon (R. 157-8) which may be supported by any evidence, such as that appellee offered evidence admitting that the sum of \$17,382.08 was "agreed to be owing." (R. 98-9).

As for contentions by appellee (p. 40) that requirements of diversity of *citizenship* are not satisfied by allegations of the supplemental complaint that all plaintiffs are "*residents and inhabitants*" of states other than Nevada, it may be that this allegation is technically defective, but the defect is one that could be corrected by amendment (*Harlee v. City of Gulfport*, *supra*, at 43) or by new action, either of which might be claimed to be foreclosed by the dismissal of this case with prejudice. As for contentions by appellee (p. 40) that the jurisdictional amount of \$3000 cannot be satisfied by aggregation of claims, it is true that ordinarily claims

cannot be aggregated for this purpose. But while such a rule might apply to aggregation of separate claims under the F.L.S.A., as in cases cited by appellee, there is a well recognized exception to that rule where, as here, the claims do not rest upon the act, but all rest upon a single agreement of compromise and settlement and therefore present a single controversy (i.e., whether the agreement of compromise and settlement is binding). See 1 *Cyc. of Fed. Proc.* (2d Ed.) sec. 165; 1 *Barron & Holtzoff*, supra, p. 49; 72 A.L.R. (Anno.) at p. 206; *Local Union No. 497 v. Joplin & P. Ry. Co.*, 287 F. 473 at 475; *Phillips Pet. Co. v. Taylor*, 115 F (2d) 726, 728. And, again, the dismissal with prejudice by Judge Fee might be claimed to foreclose not only any supplemental complaint, but also any later action, whether by aggregation of claims or otherwise.

Appellee next (p. 41-3) contends that the supplemental complaint alleges a contract based on statutory rights, which Congress can retroactively modify or destroy and that since the original complaint fails to state a cause of action in view of the Portal to Portal Act, no supplemental complaint can be allowed, particularly one based on a contract since destroyed by Congress. But, as demonstrated above, section 3 of that Act expressly authorized and ratified compromise settlements under the F.L.S.A., even of "portal-to-portal" claims. While it is true that the cases cited by appellee uphold retroactive destruction of contracts based on statutory rights, none of those cases involved statutory provisions expressly authorizing and ratifying compromise settlements, as in this case.

As for the contention that the Portal-to-Portal Act destroyed the original cause of action, thus making improper any supplemental pleading, the usual rule and the rule stated by the *Bowles* and *Berssenbrugge* cases cited by appellee (p. 42) is that if the court has jurisdiction "at the time of filing the original bill," it should allow a supplemental complaint alleging new facts occurring since the original complaint and which will modify the amount or nature of relief sought. See also 1 *Barron & Holtzoff*, supra, p. 941. It is a familiar rule that once a federal court acquires jurisdiction it may decide all questions arising until complete relief is afforded even though ultimately holding that there was no federal question. *Siler v. L. & N. R. Co.*, 213 U.S. 175, 191; *McGowan v. Parish*, 237 U.S. 285, 296; *P.R.L. & P. Co. v. Portland* (D. Or.) 210 Fed. 667. This same principle applies as to supplemental proceedings. 54 Am. Jur. p. 689. Therefore, since in this case the court had jurisdiction when the complaint was filed and since then a compromise settlement was arrived at which was expressly approved and ratified by sec. 3 of the Portal-to-Portal Act, the court could properly grant relief under a supplemental complaint to enforce such a settlement even though *after* filing the complaint the cause of action may have been retroactively destroyed by sec. 2 of the Act. In the *Bonner* case (cited by appellee, p. 42) the situation was quite different, since the supplemental complaint alleged facts subsequent even to the Portal Act, rather than a previous settlement as approved by section 3 of that Act. But, again, even though Judge Fee may have had discretion to refuse filing of a

supplemental complaint, his decision should not have been on grounds that may be urged to bar later filing of a separate action to enforce the settlement agreement.



No. 12,715

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LILBURN H. BARBEAU,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

GEORGE B. GRIGSBY,

Anchorage, Alaska,

Attorney for Appellant.

FILED

MAY 27 1935

PAUL H. O'BRIEN,

CLERK



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No. 12,715

IN THE

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LILBURN H. BARBEAU,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the Territory of Alaska, Third Division.

The appellant was charged in the indictment with the crime of murder in the first degree. (R. Vol. I, page 3.) He entered a plea of not guilty. (R. Vol. I, pages 5-6.) After a trial by jury, he was found not guilty of the crime of murder in the first degree, and not guilty of the crime of murder in the second degree, but found guilty of the crime of manslaughter by culpable negligence.

The District Court had jurisdiction to try the offense charged by virtue of the provisions of Sections 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated, 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Sections 1291 and 1294 of Chapter 83 of New Title 28, U. S. Code.

STATEMENT OF THE CASE.

Paul Gunn was shot and killed by the discharge of a Walther-P-38 automatic pistol in the hands of the appellant, Lilburn H. Barbeau. The bullet entered decedent's mouth and passing through his neck shattered one of his vertebrae, severing or partially severing the spinal cord.

This happened on the 18th of February, 1950, at about 2:30 p.m. at the residence of appellant where appellant had gone shortly before the accident in company with one Jack Howe for the purpose of trading pistols with Howe. They were driven to appellant's residence by Paul Gunn in a Cadillac car belonging to appellant which had for sometime previously and up to that time been operated as a taxicab by Gunn under a contract with appellant.

Howe was the owner of a Walther-P-38 automatic pistol of German make which he took with him at the time. Appellant possessed a weapon of the same make which he had at his residence. The circumstances which led up to the proposed exchange of

weapons are set forth in the testimony of Jack Howe (R. Vol. II, pages 1-95) and involve too much detail to be recited in this statement. The testimony in this regard is corroborated in every particular by that of the defense witness William E. Lehman (R. Vol. IV, 316-329) and Ralph Wofford (R. Vol. IV, 337), also by the appellant, and we believe it will be conceded that his testimony is true.

After the appellant, Howe, and Gunn arrived at appellant's residence all entered the house. The appellant produced his pistol and all became seated. Appellant and Howe were seated on a small settee in one corner of the room partially facing each other and about three feet apart. Gunn was seated in the other end of the room about seven feet from the appellant (R. Vol. V, 436), and about the same distance from Howe.

It was proposed and agreed that the handles or grips of the guns be exchanged, which was done, a case knife produced by Gunn from the kitchen being used as a screw driver. The appellant's gun was loaded, the clip full and a shell in the chamber. He removed the clip and shell and placed both on the cushion of the settee between himself and Howe, who changed the grips and then handed his gun now having on the grips of appellant's gun, to appellant.

Appellant took the gun from Howe, put it on safety, pulled the slide back and looked into the chamber, evidently from force of habit. Holding the gun in his left hand and in his lap he shoved in the clip

or magazine and was about to reach for the shell which he had placed on the cushion of the settee when the gun fired the bullet which struck Gunn. Evidently the impact of shoving in the clip caused the slide to fly forward, carrying a shell into the chamber, the hammer following with it. The gun being on safety could not normally be fired in this manner.

The safety of this gun was defective; consequently the gun could be fired when on safety.

The direction in which the gun was pointed would necessarily be somewhat changed by shoving in the clip.

The safety operation of the Walther-P-38 and how the gun could have been fired in the manner above described are fully explained by the testimony of Corporal Joseph Kerekes (R. Vol. V, 464-474); Kerekes was a thoroughly qualified expert.

Another expert, Peter J. Kalamarides testified to the same effect as Kerekes. (R. Vol. V, 476-485.) He testified (479) that he once owned a P-38 wherein the safety and firing pin were defective so that when the slide went forward and the lever was on safety the cartridge in the chamber exploded.

The testimony of both appellant and Jack Howe is that the gun was not raised from where appellant held it in his lap at the time it was fired.

There was no argument, no boisterous conduct, no fooling with or pointing of weapons and no drinking whatever. The three men were all on friendly terms. The shooting was accidental.

STATEMENT OF POINTS RELIED UPON.

1. That the indictment does not state facts sufficient to constitute the offense for which the defendant was convicted.

2. That the offense for which the defendant was convicted was not charged in the indictment and the Court was without jurisdiction to pronounce judgment.

3. That the Court erred in denying defendant's motion for acquittal, made at the conclusion of the evidence of the plaintiff.

4. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence in the case and after both plaintiff and defendant had rested.

5. Insufficiency of the evidence to justify the verdict, and that it is against law, in that the indictment does not charge the offense of which the defendant has been convicted.

6. Errors in law occurring at the trial and excepted to by the defendant, as follows:

(a) The Court erred in overruling the motion of the defendant, made at the conclusion of all the evidence, to exclude from the exhibits to be taken by the jury, those exhibits relating to the question of motive.

(b) The Court erred in permitting plaintiff's exhibits 9 and 10 being unsigned purported statements

of the defendant, to be taken by the jury when they retired to consider the case.

6. The Court erred in overruling defendant's Motion in Arrest of Judgment.

In addition to the foregoing, appellant assigns error upon the trial Court's denial of the Motion for Judgment of Acquittal of Second Degree Murder, made at the conclusion of the trial and after both sides had rested. (R. Vol. V, p. 509.)

The points relied upon were raised by Motions in Arrest of Judgment, Motion for New Trial; and Motion for Judgment of Acquittal on the ground of insufficiency of the evidence to sustain the conviction, made after discharge of the jury (R. Vol. I, pages 36, 37, 38), as provided in Rule 29(b) of the Federal Rules of Criminal Procedure also by Motion for Judgment of Acquittal made at the conclusion of the government's case (R. Vol. IV, page 292), Motion for Judgment of Acquittal made at the conclusion of all the evidence (R. Vol. V, 507-9, Motion for Judgment of Acquittal of Murder in the Second Degree made at the conclusion of all the evidence. (R. Vol. V, 509.)

The motion to exclude from the jury all exhibits relating to the question of motive (Point 4(a) above) was made at the conclusion of all the evidence. (R. Vol. V, 509.)

Point 4(b) above was raised by objection made after the conclusion of all the evidence, to permitting plaintiff's exhibits 9 and 10 to be taken by the jury when they retired to consider the case. (R. Vol. V,

503-507). This objection was overruled by the Court after the argument and instructions to the jury. (R. Vol. V, 510.)

ARGUMENT.

FIRST AND SECOND POINTS RAISED.

1. That the indictment does not state facts sufficient to constitute the offense for which the defendant was convicted.

2. That the offense for which the defendant was convicted was not charged in the indictment and the court was without jurisdiction to pronounce judgment.

These two points are closely connected and will be discussed together.

The crime charged is murder in the first degree. The indictment is stripped of all non-essentials; it follows the form prescribed by the Federal Rules of Criminal Procedure, and informed the accused of the nature and cause of the accusation against him, as required by the 6th Amendment to the Constitution of the United States.

It does not inform the defendant that he is about to be tried on a charge of negligent homicide, of which the defendant has been convicted.

Alaska Compiled Laws Annotated, 1949, defines manslaughter as follows:

“Sec. 65-4-4. Manslaughter. That whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter,

and shall be imprisoned in the penitentiary not more than twenty nor less than one year.

“Sec. 65-4-5.—Procuring another to commit self-murder. That if any person shall purposely and deliberately procure another to commit self-murder or assist another in the commission thereof, such person shall be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-6.—Abortion. That if any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or such mother be thereby produced, be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-7.—Physician administering poison, etc., or doing act resulting in death while intoxicated. That if any physician, or any person acting as or pretending to be a physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any act to another person which shall produce the death of such other, such physician shall be deemed guilty of manslaughter, and shall be punished accordingly.

“Sec. 65-4-8.—Negligent homicide. That every killing of a human being by the culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, shall be deemed manslaughter, and shall be punished accordingly.”

Excusable homicide is defined as follows:

“Sec. 65-4-11. Excusable homicide. That the killing of a human being is excusable when committed:

“First. By accident or misfortune in lawfully correcting a child, *or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; * * **”
(Italics ours.)

Rule 7(c) of the Federal Rules of Criminal Procedure provides as follows:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Rule 31(c) of the Federal Rules of Criminal Procedure provides as follows:

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein, if the attempt is an offense.

The offense of manslaughter by culpable negligence is not necessarily included in a charge of murder in the first degree.

It is conceded that manslaughter as defined in Section 65-4-4, above, is necessarily included in the offense charged in the indictment because, as required by Federal Rule 7(c), every essential fact constituting manslaughter, as thus defined, is charged in the indictment. But the species of homicide defined in the

following four sections of the Alaska Code, above quoted, namely: manslaughter by procuring another to commit self-murder, manslaughter by abortion, manslaughter by physician administering poison, etc. and manslaughter by negligent homicide, are not included in the offense charged in the indictment because all the essential facts constituting these offenses are not charged in the indictment.

As to the first three kinds of homicide last above mentioned, none of the essential facts constituting the offense are charged, except the killing. As to manslaughter by negligent homicide, the killing is charged in the indictment and that it was accomplished by shooting with a pistol, but the third essential fact, namely, that the killing was the result of culpable negligence on the part of the defendant is not included in the offense charged in the indictment.

The basic test must be, that the indictment must inform the defendant of the nature and cause of the accusation against him.

Any offense of which he is not so informed by the indictment necessarily cannot be considered an included offense.

The rule is stated in American Jurisprudence, Vol. 27, as follows:

“Sec. 194. Offenses of Lesser Degree and Included Offenses. It is a well established general rule that when an indictment charges an offense which includes within it another, lesser offense, or one of a lower degree, the defendant although

acquitted of the higher offense, may be convicted of the lesser. * * *

“This Rule is embodied in the statutes in many jurisdictions. The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, *and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense.* (Italics ours.)

“If the greater of two offenses includes *all* the legal and *factual* elements of the lesser, the greater includes the lesser, but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.” (Italics ours.)

Vol. 27, Am. Jur., sec. 194, citing

Watson v. State of Georgia, 43 S.E. 32;

State v. Woolman 33 P. (2d) 640, and other cases.

“It is also the rule, both at common law and under the statutes of many of the states, that an indictment or information is insufficient to charge the accused with a commission of a minor offense, or of one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense or sufficiently sets them forth by separate allegations in an added count.” Vol. 27, Am. Jur., Sec. 105.

The rule is stated in *State v. Woolman, supra*, as follows:

“Greater offense includes lesser offense only when greater offense includes all legal and factual elements required to constitute lesser offense.

“Under provisions that accused may be found guilty of any offense, the commission of which is ‘necessarily included’ in that with which he is charged, the lesser offense must not only be a part of the greater in fact, but must be embraced within the legal definition of the greater as a part thereof, * * *”

42 C.J.S., sec. 273, citing

People v. Kerrick, 77 Pac. 711;

People v. McGrath, 271 Pac. 549;

State v. Woolman, 33 P. (2d) 640.

This Court, in *Giles v. U. S.*, 144 F. (2d) 860, has very succinctly stated the rule as follows:

“To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.”

Citing:

House v. State, 117 N.E. 647.

See also:

Wood v. Commonwealth, 7 S.W. 391.

The rule, as stated by this Court, would seem to dispose of this matter, but the trial Court in disposing of the motions of the defendant commenting upon this subject, states as follows:

“The defendant contends that since, with respect to murder in the first degree, the necessary charge is that the killing is voluntary, manslaughter through culpable negligence contains an element not included in the first degree murder, to wit, negligence. It is obvious that the killing of a human being by the culpable negligence of another under Alaska Law, as set forth in Section 65-4-8 above quoted, is a species of manslaughter, and nothing else. The law so declares it. It is equally plain that the gist and essence of the offense of manslaughter lies in the unlawfulness of the killing, whether voluntary or involuntary. It cannot rightly be said that negligence is an essential element of the crime necessary to be charged in the indictment, the only necessary, indispensable element being that the killing is unlawful. A negligent killing is merely one kind of unlawful killing. The question of negligence is subordinate to the main issue; it merely defines the type and is a matter of detail. Nothing to the contrary appears in the case of *Giles v. United States*, 144 F. (2d) 860, 9th Cir. in which the rule on the subject is quoted as follows:

‘To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.’

“In the instant case, the greater offense with which the defendant was charged was murder in the first degree involving a killing done purposely and by deliberate and premeditated malice. Under both types or species of the crime of manslaughter it is required only that the killing be

unlawful. Even in Sec. 65-4-4, *supra*, which embraces voluntary manslaughter, there is no statutory requirement of purpose or intent; and, of course, under Sec. 65-4-8, *supra*, dealing with negligent homicide, it is assumed that purpose or intent to kill are absent. Hence, it logically follows that every essential element of manslaughter by negligent homicide is necessarily included in the offense of murder in the first degree charged in the indictment." (Opinion of the Trial Court—Record Vol. I, pages 52-54.)

We agree with the trial Court that "the killing of a human being by the culpable negligence of another" is a species of homicide which the statute says "shall be deemed manslaughter" and that "the gist of the offense lies in the unlawfulness of the killing." We cannot agree, however, that culpable negligence is not a factual element of the offense of manslaughter by culpable negligence nor that a man can be convicted of this offense without being charged with it.

The trial Court in its opinion cites California and Oregon cases to sustain its view that the indictment in this case includes a charge of manslaughter by culpable negligence.

People v. Pearne, 50 Pac. 376 (1897), a California case, is quoted as follows:

"An indictment laid for murder charges an intentional killing, yet under the criminal practice and procedure in this state there is no doubt but that a verdict of involuntary manslaughter would find support in such a pleading."

“This is so because involuntary manslaughter is ‘the unlawful killing of a human being’ and such crime is always in an indictment for murder.”

The trial Court quotes *State v. Nortin*, 133 P. (2d) 252, an Oregon case, as follows:

“The statute provides ‘in all cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime. OCLA, sec. 26-948.’

“Under this statute, all degrees of homicide, including voluntary and involuntary manslaughter, are in the eyes of the law included in the charge of murder in the first degree.” (R. Vol. I, 54-55.)

Other authorities are cited in the trial Court’s opinion to the same general effect.

According to these decisions, the general rule stated by this Court in the *Giles* case, *supra*, does not apply to homicide. This conclusion seems to be arrived at by a syllogistic line of reasoning resulting in the abstract proportion that all species of manslaughter are necessarily included within the crime of murder, whether or not charged within the language of the indictment.

The trial Court states that the Oregon cases are cited because of similarity existing between the laws of Oregon and Alaska with respect to homicide. As a

matter of fact, there is considerable difference as far as the question here involved is concerned.

Section 23-406 O.C.L.A. provides:

“If any person shall, in the commission of an unlawful act without due caution or circumspection, involuntarily kill another such person shall be deemed guilty of manslaughter.”

The laws of Alaska contain no section defining involuntary manslaughter.

Section 23-410 O.C.L.A. provides:

“Every other killing of a human being by act, procurement or *culpable negligence* of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter.” (Italics ours.)

The Alaska section defining negligent homicide is again quoted as follows:

“Sec. 65-4-8.—Negligent homicide. That every killing of a human being by the culpable negligence of another when such killing is not in the first or second degree or is not justifiable or excusable, shall be deemed manslaughter and shall be punished accordingly.”

It will be noticed that in the Oregon definition of negligent homicide the words “by act, procurement or culpable negligence” are used, while in the Alaska statute the words “act, procurement” are omitted. Also, the Oregon statute defines involuntary manslaughter while the Alaska statute does not.

The Alaska Code, section 65-4-11, defines excusable homicide as follows:

“First. By accident or misfortune in lawfully correcting a child, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent.”

Thus it will be noticed that under the Oregon laws every killing of a human being which is not justifiable or excusable is deemed manslaughter, while under the Alaska laws, which do not define involuntary manslaughter, a homicide in order to constitute manslaughter under the definition of negligent homicide, the killing must not only be not excusable and not justifiable, but must be committed with *culpable* negligence. The question arises, what would be necessary to charge in an indictment for manslaughter by culpable negligence? The Supreme Court of Oregon has answered this question in *State v. Miller*, 243 Pac., page 74(3):

“(3) If the defendant had been indicted for having committed the crime of involuntary manslaughter by the doing of a lawful act ‘without due caution or circumspection,’ it would have been necessary under that theory to have alleged specifically the facts constituting such negligence. The rule in alleging negligence in civil actions would then apply. This distinction in pleading is recognized in *People v. Ryczek*, 224 Mich. 106, 194 N.W. 609, and in *People v. Townsend*, 214 Mich. 267, 183 N.W. 177, 16 A.L.R. 902. In the latter case the court said:

“ ‘The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged, as well as the acts of the accused constituting failure to perform or improper performance.’ ”

“Appellant relies strongly upon *State v. Gesas*, 49 Utah, 181, 162 P. 366; but an examination of the indictment in that case discloses the crime of involuntary manslaughter was not based upon the commission of an unlawful act. The court very properly held that the facts constituting the alleged negligent operation of the automobile should have been pleaded and not conclusions upon which no issue could be joined. * * *

Section 147, page 1036, 40 C.J.S. is as follows:

“Sec. 147.—Omission of Duty or Negligence.

“Where the homicide is charged to have resulted from a negligent act or omission the indictment or information must be with certainty

sufficient to put the accused on notice of the offense with which he is charged. The act or omission must be alleged and such facts and circumstances as are essential to show negligence, but the duty violated, or the standard of care required, ordinarily need not be averred."

Citing D.C.—*U.S. v. Geare*, 293 F. 997, 54 App.

D.C. 30;

Mich.—*People v. Maki*, 223 N.W. 70, 245 Mich. 455;

N. M.—*State v. Gray*, 30 P. (2d) 278, 282, 38 N.M. 203, quoting *Corpus Juris*;

Okl.—*Vaughn v. State*, 276 P. 701, 42 Okl. Cr. 376;

Or.—*State v. Miller*, 243 P. 72, 119 Or. 409, affirmed *Miller v. State of Oregon*, 47 S.Ct. 344, 273 U.S. 657, 71 L.Ed. 825;

30 C.J. p. 97, note 27.

We believe no Federal Court has ever dispensed with the requirement that an indictment must inform the defendant of the nature and cause of the accusation against him.

If the reasoning of the *Miller* case, *supra*, is sound, which it appears to be, then some degree of detail is required in drawing an indictment charging "involuntary manslaughter by the doing of a lawful act without due caution or circumspection."

At least as much detail should be required in charging culpable negligence as in charging ordinary negligence.

Confronted with the necessity of pleading these necessary details it certainly would be a labor saving device for the pleader to charge murder in the first degree, and thus giving the defendant as little information as possible.

The *Pearne* case, *supra*, a California case, cited by the trial Court seems to support the Court's views, yet in *People v. McGrath*, 271 Pac. 549, another California case, the Court says:

"Under penal code, section 1159, authorizing a jury to find defendant guilty of any offense, the commission of which is necessarily included in the offense with which he is charged, to be 'necessarily included' in offense charged, lesser offense must not only be a part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof." (Syllabus.)

We contend that the true rule as to the conviction of an included offense is stated in *Watson v. State of Georgia*, as follows:

"But the general rule is to be qualified to the extent that the lesser offense must either necessarily be included in a general charge of the greater, or, if it may or may not be, then the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser.

"Under an indictment for murder the accused may be convicted of a lower grade of felony, or even of a misdemeanor, if the lesser offense is one

involved in the homicide, and is sufficiently charged in the indictment." (Syllabus.)

Watson v. State of Georgia, 43 S.E. 32.

In *Hill v. State*, 11 N.E. (2d) 141, an Indiana case, the defendant was convicted of involuntary manslaughter on a charge of voluntary manslaughter. The opinion states:

"(4) In instruction No. 9 given by the court of its own motion, the jury was instructed that they could return one of three verdicts, viz.: One of not guilty, or one of voluntary manslaughter, or one of involuntary manslaughter. This instruction is clearly erroneous. The appellant was charged in the affidavit with voluntary manslaughter, and one so charged cannot be found guilty of involuntary manslaughter. The two degrees of manslaughter are distinct and different crimes. *Bruner v. State* (1877) 58 Ind. 159; *Adams v. State* (1879) 65 Ind. 565; *State v. Lay* (1884) 93 Ind. 341. In the latter case it is said: 'An indictment for voluntary manslaughter will not support a conviction for involuntary manslaughter, and vice versa. * * * Though the penalty is the same in both, the crimes of voluntary and involuntary manslaughter are as separate and distinct as those of grand larceny and robbery.' * * *"

In the trial Court's opinion (R. Vol. I, 57-58) is the following:

"The defendant's present theory of the law finds no support in the Sixth Amendment, providing that 'the accused shall enjoy the right * * * to be informed of the nature and cause of

the accusation.' The indictment charged that the defendant '* * * killed Paul Gunn by shooting the said Paul Gunn with a pistol.' That information was so circumstantial and complete that the defendant, although represented by two able and experienced counsel of his own choosing, made no request or demand for a bill of particulars or in any other manner asked to be further 'informed of the nature and cause of the accusation.' In fact, defendant through his counsel proposed to the Court instructions to the jury of the precise nature given and upon the very issue of which he now complains. The charge of the indictment that the defendant 'killed Paul Gunn by shooting the said Paul Gunn with a pistol' is explicit. The indictment further charged that the killing was unlawful, not that the word 'unlawful' was used in the indictment, but because that averment was necessarily included in the crime charged. The jury found the defendant guilty of an unlawful killing, and the law says an unlawful killing without more, is manslaughter. So the requirements of the Sixth Amendment were fully met."

A demand for a bill of particulars, if granted, could have afforded no information to the defendant as to the crime of manslaughter by culpable negligence without stating facts, which if originally contained in the indictment, would have been repugnant to the charge of murder in the first degree and contradictory thereof.

In this connection we call attention to *People v. Hoffman*, 220 N.Y.S. 249, where a similar situation is presented.

It is true as stated by the trial Court that appellant's counsel "proposed instructions to the jury of the precise nature given and upon the very issue of which he now complains."

The answer is that the point here raised is lack of jurisdiction, and jurisdiction cannot be stipulated nor lack of jurisdiction waived.

The defendant moved for a judgment of acquittal both at the conclusion of the government's case and at the conclusion of all the evidence, and after verdict the Court denied all these motions, the points here raised were stated in the Motion for Arrest of Judgment. (R. Vol. I, 36.)

The Third and Fourth Points Raised have been covered by the argument on the First and Second Points.

FIFTH POINT RAISED.

Insufficiency of the evidence to justify the verdict and that it is against law.

The point that the verdict was against law has been fully covered by the argument on the first and second points raised.

The question of insufficiency of the evidence to justify the verdict was raised by the several motions for judgment of acquittal, and the motion for new trial.

The appellant was found guilty of manslaughter by culpable negligence. The trial Court instructed the jury as follows:

“ ‘Culpable negligence’ as used in the law which applies in this case, is negligence of such a degree, so gross and wanton, as to be deserving of punishment, or criminal. Culpable negligence is something more than the slight negligence necessary to support a civil action for damages. Culpable negligence implies a reckless disregard of consequences, a needless indifference to the rights and safety and even the lives of others.

“The word ‘wanton’ has been used in these instructions. As so used, a ‘wanton’ act is one that is marked by, or which manifests, arrogant recklessness of justice or the rights of others; a reckless disregard for the safety of another.” (R. Vol. I, 13, 14.)

However, in the trial Court’s opinion some doubt is expressed as to whether its instructions were not too favorable to the accused. (R. Vol. I, 49-51.) Therefore, a brief review of the authorities on this question is deemed proper.

In *Reed v. Madden*, 87 F. (2d) 851 (1) the Court says:

“(1) The pertinent principle of law with respect to the degree of negligence essential to the crime of manslaughter is well stated by the Supreme Court of Missouri in *State v. Melton*, 326 Mo. 962, 33 S. W. (2d) 894, 895: ‘To make negligent conduct culpable or criminal and make it manslaughter, the particular negligent conduct of the defendant must have been of such a reckless or wanton character as to indicate on his part utter indifference to the life of another who is killed as a result thereof. Thus only may the

criminal intent, so essential in a criminal prosecution, properly be found by the jury.'

"It is difficult to ascribe to Reed either any intent to injure, or this essential degree of wanton and reckless conduct, under the circumstances and conditions by which he was surrounded. * * *"

In *State v. Powell* (Mont.), 138 P. (2d) 950, the Court says:

"(1, 2) This court has never defined what is meant by the italicized portion above, that is, what degree of negligence is necessary to impose criminal responsibility. This question, however, is well settled in other jurisdictions. The general rule is stated in 26 Am. Jur., page 299, as follows: 'The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard for human life or an indifference to consequences.' "

It will be noted that in the *Powell* case the rule was applied to involuntary manslaughter in the commission of the lawful act which might produce death,

in an unlawful manner, *or without due caution or circumspection.*

The statute violated did not use the term "culpable negligence."

"Negligence relied upon to constitute manslaughter under Comp. St. 1920, sec. 7070, must be more than ordinary negligence and must be culpable or criminal in its nature. *State v. McComb*, 239 Pac. 526 (Syllabus.)"

We call attention to the authorities collated on page 528 (2) of the opinion in the *McComb* case.

In a note to *Smith v. State of Mississippi*, 161 A.L.R. 10, the decisions of all the state courts on the subject of Homicide Through Culpable Negligence are collated. On page 17 the note states:

"Relation to ordinary negligence. Prior to presenting specific definitions of the terms, consideration will be given to the relationship of 'culpable' and 'criminal' negligence to ordinary, actionable negligence. For leading definitions, see *infra*, this subdivision, under subhead 'Definitions.'

In most of the jurisdictions where the question has come before the courts, the term 'culpable negligence,' as used in a particular manslaughter statute, has been construed as meaning negligence of a higher degree than ordinary negligence which suffices as a basis for liability in a civil action."

Numerous decisions in support of this text are then cited from, United States, Florida, Kansas, Minnesota,

Mississippi, Missouri, New Jersey, Oklahoma, South Dakota and Wyoming.

The following extract from this annotation, page 39, is especially applicable to all the aspects of the point here under discussion:

“The modern leading case upon the present subject in New York is *People v. Angelo* (1927) 246 NY 451, 159 NE 394 (affirming (1926) 219 App Div 646, 221 NYS 447, which reversed a conviction of manslaughter in the second degree as to which certificate of reasonable doubt was granted in (1926) 126 Misc 448, 214 NYS 499). In this case the Court of Appeals, in a distinguished opinion by Andrews, J., carefully examined the judicial and legislative history of the expression ‘culpable negligence’ in the New York manslaughter statute, tracing it back to the common law, and reached the conclusion: “ ‘Culpable’ negligence is therefore something more than the slight negligence necessary to support a civil action for damages. It means, disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment—ordinarily for the judgment of the jury, as is the question whether negligence exists at all; but in the one case as in the other it may become a question of law. If the negligence is so slight as not to reach the required standard, the court should advise an acquittal of the accused. Under such circumstances the jury may not be allowed to find a verdict of guilty. * * * (In the case at bar the

trial judge) refused to charge that slight negligence was not culpable but left it to the jury to say whether it was or was not. This was error and under the facts of the case substantial error. However indefinite the rule, however uncertain the meaning of such words as 'gross,' 'wanton,' 'reckless,' 'slight,' yet in view of the facts of a particular case, both the rule and the words do convey an idea to the jury sufficient to guide their action." The court, after reviewing the common law as to manslaughter through negligence and the meaning of culpable or criminal negligence at common law, said that it seemed clear that the legislature used the word 'culpable' in the same sense as it had been used for centuries—"as the equivalent of 'criminal,' 'reckless,' 'gross,' such negligence as is worthy of punishment." The court also pointed out: "As to precedents at least as early as 1664 the distinction is made between negligence so great as to be blameworthy and, therefore, deserving punishment and the slight degree of negligence that would not justify a criminal charge. * * * And later cases reiterate this settled rule. * * * They use such words as 'gross,' 'reckless,' 'culpable.' Consistently they assert, expressly or by implication, that something more is required than the bare negligence that might be sufficient to support a civil action. They hold that it is for the jury to decide, in view of all the circumstances, whether the act was of such a character as to be worthy of punishment."

We also quote from *United States v. Geare*, 293 Fed., page 1000 (3, 4, 5):

“(3, 4) This brings us to the second branch of the case, the failure of the indictment to state facts sufficient, if true, to establish criminal negligence. The negligence, here sought to be charged against these defendants, occurred while they were engaged in the performance of lawful acts. In such cases the indictment must set out with the utmost clearness the facts upon which criminal negligence is predicated. In this the present indictment is lacking. Indeed, it fails to meet any of the established rules of criminal pleading. An indictment should contain every essential fact necessary to clearly define the crime, and the offense sought to be charged should be set out with sufficient accuracy and completeness to support a judgment, either upon demurrer or conviction. It is true that the indictment charges the defendants collectively with undertaking and assuming to construct and erect the building, and to plan, design, fabricate, and furnish materials therefor, and that in so doing they unlawfully feloniously, and carelessly failed and neglected to perform their separate assumptions and obligations in a careful and skillful manner. But these are merely conclusions of the pleader. Nowhere does it appear in what particular the cement, or brick, or steel work was defective; nor does it appear in what respect the plans and specifications and superintendence or inspection of the work contributed to the accident.

“(5) The reason for the requirement that all the material facts and circumstances, essential to a clear definition of the offense, must appear in the indictment, is, first, to furnish the accused with such a description of the charge against

him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.' United States v. Cruikshank, 92 U.S. 542, 558 (23 L. Ed. 588)."

SIXTH POINT RAISED.

"6. Errors in law occurring at the trial and accepted to by the defendant, as follows:

(a) The court erred in overruling the motion of the defendant, made at the conclusion of all the evidence, to exclude from the exhibits to be taken by the jury, those exhibits relating to the question of motive.

(b) The court erred in permitting plaintiff's exhibits 9 and 10 being unsigned purported statements of the defendant, to be taken by the jury when they retired to consider the case."

Point 6(a). The appellant went to trial on a charge of murder in the first degree. Most of the time consumed in the trial of the case by the government was used in an effort to prove motive, and documentary evidence was introduced in an effort to prove that the defendant Barbeau was involved in the theft

of an automobile transmission and that Paul Gunn, the man killed, had been interviewed by the police regarding this matter, the inference being that Barbeau feared exposure at the hands of Gunn and therefore had a motive for putting him out of the way. At the conclusion of the trial the Court indicated that the question of murder in the first degree would be taken from the jury and thereupon appellant's counsel moved that all exhibits relating to the question of motive be excluded from the exhibits taken by the jury. The motion was denied.

These exhibits were plaintiff's exhibits Nos. 9, 10, 11, 12 and 13.

The question of murder in the second degree was not taken from the jury but it is difficult to see how evidence of motive could have any bearing upon that degree of the crime.

The jury, as instructed, returned a verdict of Not Guilty of Murder in the First Degree. However, having had their minds directed to that issue during a greater part of the trial and that issue having been eliminated, not only should the jury have been instructed to disregard all evidence of motive, but all exhibits relating thereto should have been excluded and not left with them as a constant reminder that the accused was suspected of larceny and that fear of exposure of larceny was a motive for murder.

The remarks of this Court in *Karn v. United States*, 158 F. (2d) 572 (9, 10), on a similar situation are applicable on this point.

It is also to be remembered that in this case objection was made to the taking of the exhibits by the jury and the motion to exclude them was argued. (R. Vol. V, 509.)

There was no inadvertence or mistake as in the *Karn* case.

Point 6(b). Specific objection was made to plaintiff's exhibits 9 and 10 being taken by the jury. (R. Vol. V, 503-7.) These exhibits were unsigned statements of the defendant Barbeau, used to refresh the recollection of government witnesses. No objection was made to their introduction in evidence. It was conceded by the Court (R. Vol. V, 507) that they would have been excluded if objection had been made. However, these exhibits come under the general objection made to all exhibits relating to the question of motive.

The Seventh Point raised, erroneously numbered 6, that the Court erred in overruling defendant's Motion in Arrest of Judgment was covered in the argument on the First and Second Points.

MURDER IN THE SECOND DEGREE.

Error is assigned on the trial Court's denial of the Motion for Judgment of Acquittal of Second Degree Murder made at the conclusion of the trial and after both sides had rested. (R. Vol. V, 509.) Murder in the second degree is defined in the Court's instruction No. 2 as "the killing of a human being purposely and

maliciously", and purposely as "intentionally and not accidentally". (R. Vol. I, 10.)

Of course, both these elements are included in a charge of murder in the first degree.

Instruction No. 2 also defines malice, both actual and personal malice, and the malice implied from the intentional firing of a deadly shot.

The Court, having eliminated murder in the first degree from the case, it is difficult to understand on what theory murder in the second degree was left in the case.

There was no evidence whatever connected with the circumstances of the shooting, nor elsewhere in the record, to indicate purpose, malice or intent.

Leaving second degree murder in the case necessarily invited the jury to consider that charge. They were virtually told by the Court that there was some evidence of second degree murder, that there was some evidence of purpose, malice and intent, when in fact there was none. The ruling of the Court denying the Motion for Acquittal of Second Degree Murder was error and if error was manifestly highly prejudicial.

CONCLUSION.

The appellant was indicted for murder in the first degree and convicted of manslaughter by culpable negligence.

There may have been sufficient evidence in support of murder in the first degree to warrant a bind-over, but not sufficient evidence to justify an indictment on that charge, and not sufficient to submit to the trial jury and the trial Court so ruled. However, in their laudable efforts to suppress crime, prosecuting attorneys are sometimes prone to secure indictments for the greater offense in order to facilitate the conviction of a lesser offense. Such tactics do have that tendency. Also, there is always the hope that some additional evidence may drop in from somewhere.

The appellant was compelled to defend himself on a charge of manslaughter by culpable negligence on an indictment for murder in the first degree. It cannot be contended that the indictment gave the appellant the slightest inkling that he was charged with the lesser offense. That being the case, it cannot in reason be held that the lesser offense was a necessarily included offense within the meaning of the Federal Rules of Criminal Procedure or the rule laid down by this Court in the *Giles* case, *supra*. No authorities can be cited contrary to the decision in the *Geare* case, *supra*, as to the essentials of an indictment for negligent homicide. It cannot be possible that such essentials can be avoided by charging a greater offense.

The appellant is entitled to a reversal on the first and second points relied upon.

The appellant was handicapped by the case being submitted to the jury on a charge of murder in the second degree. While there was no evidence to sustain

that charge, the jury was virtually told that there was such evidence, which left the question a subject for debate. Such a situation was not calculated to enable the jury to fairly and impartially consider the question of whether the negligence ascribed to the defendant amounted to the degree of negligence which constitutes culpable negligence.

The appellant was also handicapped by the fact that evidence in the form of exhibits relating to the charge of murder in the first degree was allowed to go to the jury when they retired. This procedure was contrary to the views of this Court expressed in *Karn v. U. S.*, *supra*. This error by itself may have been sufficiently prejudicial to warrant a reversal.

As to the sufficiency of the evidence to justify the verdict, the question of whether negligence is culpable or not is ordinarily one for the jury. In *People v. Angelo*, referred to in the note to *Smith v. State of Mississippi*, above, which is set forth in full on page 26 of this brief, the case was reversed because the trial judge refused to charge that slight negligence was not culpable but left it to the jury to say whether it was or not.

Certainly the evidence in the present case did not show the degree of negligence necessary to constitute culpable negligence as defined in the trial Court's instructions which were that culpable negligence implies a reckless disregard of consequences, a heedless indifference to the rights and safety and even the lives of others.

No such degree of negligence was shown by the evidence.

We do not believe that if the appellant had been tried on the charge for which he was convicted, on the evidence relating to that charge alone, a conviction could have possibly resulted.

Neither the appellant nor the witness Howe had ever been convicted of a crime. The jury must have been influenced by other considerations than the evidence relating to the homicide itself.

Their verdict must have been the result of prejudice created in the minds of some of them by the indictment of murder in the first degree, by the submission to them of the charge of murder in the second degree and by the retention of exhibits not properly before them, all of which taken together were calculated to render their minds incapable of fairly discriminating between negligence and the culpable negligence necessary to justify a conviction.

We submit that the judgment of conviction should be reversed.

Dated, Anchorage, Alaska,
March 23, 1951.

Respectfully submitted,

GEORGE B. GRIGSBY,

Attorney for Appellant.

No. 12715

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

LILBURN H. BARBEAU, Appellant

VS.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

RALPH E. MOODY
Assistant United States Attorney
Anchorage, Alaska
Attorney for Appellee

No. 12715

**In the United States Circuit Court of Appeals
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LILBURN H. BARBEAU, Appellant

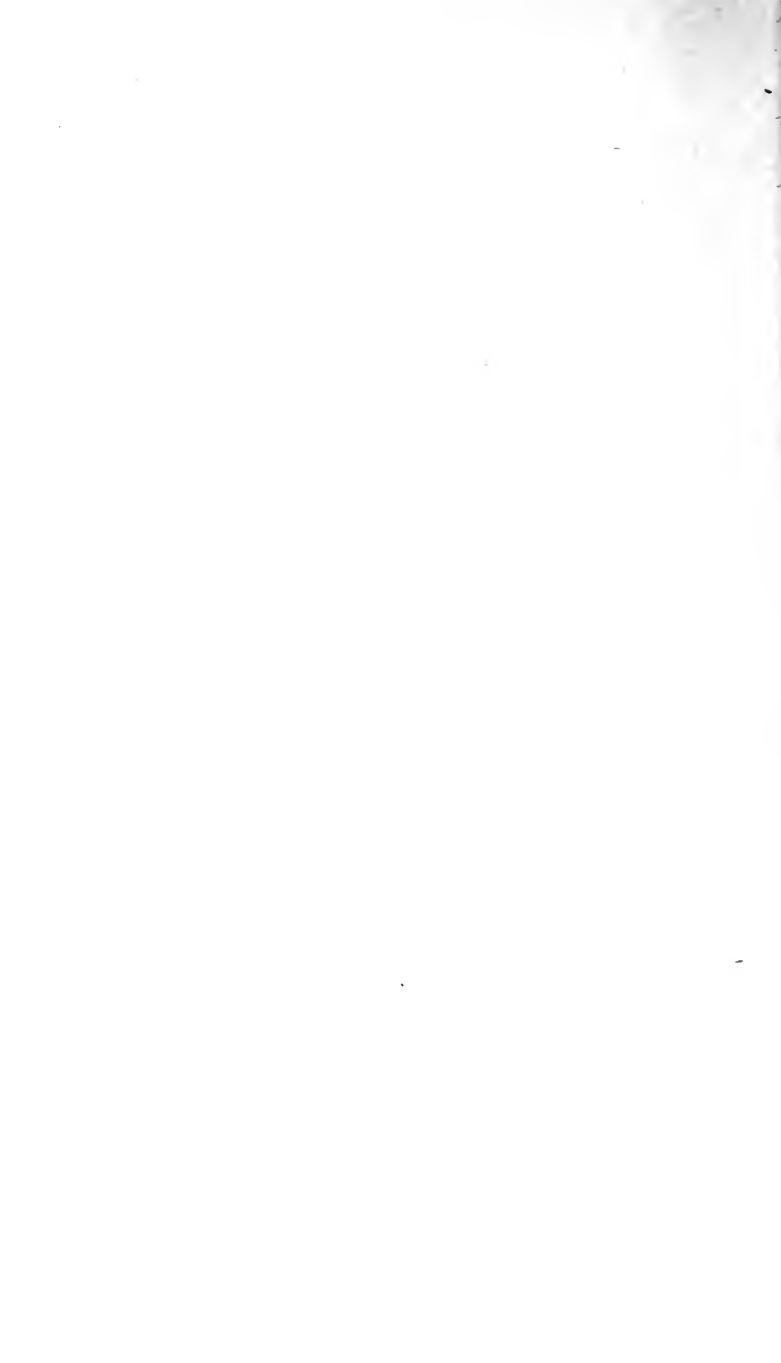
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**In the United States Circuit Court of Appeals
For the Ninth Circuit**

No. 12715

LILBURN H. BARBEAU, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (P. 1-2).

STATEMENT OF THE CASE

The statement of the case as set forth in the Brief of Appellant is substantially correct with the following exceptions:

The appellant, Lilburn H. Barbeau, knew that the deceased was sitting in a chair in front of him when he was loading his gun (R. Vol. V, P. 456).

There is evidence from the expert witness, Peter J. Kalamarides, who also testified at the preliminary hearing before the United States Commissioner, that the appellant Barbeau gave a different version at the preliminary hear-

ing of the manner in which the gun went off that killed the deceased, than testified to at the trial of this case; and that in the expert's opinion, according to the appellant's version of the incident, it would have been impossible for the gun to have fired (R. Vol. V, P. 482-485).

Obviously, there must have been a pointing of the weapon, intentionally or otherwise, at the deceased since it is admitted by the appellant that the shot from his gun killed the deceased; and, furthermore, the appellant admits he knew the deceased was sitting in a chair just a few feet from him when he started loading his gun (R. Vol. V, P. 456).

It is believed that an additional statement of fact should be briefly set out in view of the appellant's statement of points relied upon as set out in appellant's opening brief (P. 5-6).

The appellant gave a statement to members of the Anchorage, Alaska, Police Department on February 10, 1950, just eight days prior to the death of the deceased, in which he admitted certain repairs to the transmission in a 1948 Cadillac (R. Vol. II, P. 162-163). The appellant also was aware that he and the deceased were suspected of having had a stolen transmission placed in their 1948 Cadillac, as indicated in the testimony of Sergeant Roy Hendricks (R. Vol. II, P. 155-163), and the witness Moody (R. Vol. II, P. 178-182). An examination of

the transmission in the subject Cadillac car by Sergeant Roy Hendricks, of the Anchorage Police Department, was made prior to the February 10, 1950, interview of the appellant. The transmission was examined by him and others on several occasions subsequent thereto. It was ascertained that the transmission in the appellant and deceased's car was not the transmission that had originally been in the car. This was determined by comparison of paints on the motor and transmission, and the fact that the original transmission from the appellant and deceased's car was in the possession of the Anchorage Police Department (R. Vol. II, P. 164-177).

Testimony of employees and mechanics of two local garages pertaining to the circumstances surrounding the removal of the original transmission from the appellant and deceased's car, and the installation of the stolen transmission, are set forth in (R. Vol. III, P. 187 to 260-39) and involves too much detail to be recited in this statement.

Circumstances and testimony pertaining to the transmission would indicate that the appellant and the deceased were not on the best of terms. There was sufficient evidence, if believed by the jury, to have convicted the appellant of Second Degree Murder. There was also sufficient evidence to sustain a conviction of appellant of the crime of Manslaughter by Culpable Negligence.

ARGUMENT

FIRST POINT: 1. THERE WAS NO ERROR IN THE INDICTMENT, SINCE INDICTMENT DOES STATE FACTS SUFFICIENT TO CONSTITUTE THE OFFENSE OF MANSLAUGHTER BY CULPABLE NEGLIGENCE.

SECOND POINT: 2. THERE WAS NO ERROR ON THE PART OF THE COURT IN SUBMITTING TO THE JURY QUESTION OF THE GUILT OF APPELLANT OF THE CRIME OF MANSLAUGHTER BY CULPABLE NEGLIGENCE AS MANSLAUGHTER BY CULPABLE NEGLIGENCE IS A LESSER INCLUDED OFFENSE OF THE CRIME OF MURDER IN THE FIRST DEGREE; THEREFORE, THE COURT DID HAVE JURISDICTION TO PRONOUNCE THE JUDGMENT.

Since the above two points were discussed together by the appellant in his brief (P. 7-23), they will be discussed together in appellee's brief.

It is submitted that there is no merit to the above contention raised by the appellant.

The pertinent provision of the Compiled Laws of Alaska Annotated, 1949, under which this indictment was drawn, reads as follows:

SECTION 65-4-1, First Degree Murder.

That whoever, being of sound memory

and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

The following Section 65-4-2, entitled, "Obstructing or Injuring Railroad: Verdict." Has no application to this case and is referred to here merely to explain the following Section.

Second Degree Murder is defined by Alaska Compiled Laws Annotated, 1949, as follows:

SECTION 65-4-3-Second Degree Murder.

That whoever purposely and maliciously, except as provided in the last two sections, kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than fifteen years.

Definitions of manslaughter are contained in **Alaska Compiled Laws Annotated, 1949, in Sections 65-4-4 through 65-4-8**, and are set out in appellant's brief (P. 7-8).

Excusable homicide is defined in **Alaska Compiled Laws Annotated, 1949, Section 65-4-11**, and is set out in appellant's brief (P. 9).

The appellant, in his brief (P. 7), concedes that all of the requirements of **Rule 7 (c), and Rule 31 (c) of the Federal Rules of Criminal**

Procedure are met in the charging portion of the indictment as to the offense of the murder in the first degree, murder in second degree, and manslaughter (R. Vol. I, P. 3), which reads as follows:

That on or about the 18th day of February, 1950, at Anchorage, Third Judicial Division, District of Alaska, Lilburn H. Barbeau purposely and of deliberate and premeditated malice killed Paul Gunn by shooting the said Paul Gunn with a pistol.

The appellant cites the following Sections of **Alaska Compiled Laws Annotated, 1949:**

Section 65-4-5, Procuring another to commit self-murder.

Section 65-4-6, Abortion.

Section 65-4-7, Physician administering poison, etc.

Section 65-4-8, Negligent homicide,

and states that they are not included in offenses charged in the indictment for murder in the first degree.

We are not here concerned with any of the referenced sections except the last, and that only to the extent as to whether there should have been an allegation that the killing was the result of culpable negligence on the part of the appellant. It is believed that the authority cited by the appellant in his brief (P. 10-12) states the general law on the subject, but it is submit-

ted that they are not authority for the proposition advanced by the appellant; namely, that negligent homicide is not a lesser included offense under an indictment for the crime of first degree murder under the statutes of Alaska.

The contention that the failure to allege culpable negligence in the indictment omits an essential element of the crime of which appellant was convicted is answered by the trial judge in his opinion (R. Vol. I, P. 52-56).

The trial judge's opinion is amply supported by authorities in other jurisdictions.

In **State v. Stanford**, 15 S. 2d. P 817, Supreme Court of Louisiana, the appellant was indicted and tried for the crime of manslaughter; and the jury, under proper instruction from the Court, returned a verdict of guilty of negligent homicide. A negligent homicide statute was in effect in Louisiana. The appellant there argued that the offense of negligent homicide does not include all the elements of the crime of manslaughter because the former was committed without the intent to take the life of another; whereas, in the latter there must be intent to cause death or great bodily harm, etc. * * *

The Court in its opinion states:

murder, manslaughter and negligent homicide are each classified as homicides but are of different magnitudes or grades. All of them are identical in that the offense con-

sists of the killing a human being by another. The only difference between them is the degree of intent, as will appear from a reading of the above quoted and pertinent articles. So, where a homicide is committed, the grade of the offense depends upon the intent of the defendant in committing the act which directly or indirectly caused or resulted in the victim's death.

It will be noted that Article 5 of the Louisiana Criminal Code is a general one dealing with the subject where greater offenses include lesser ones and it recognizes the right of the State to prosecute for and convict of either the greater crime or one of the lesser offenses included in the greater. Article 386 of the Code of Criminal Procedure, as amended, specifically deals with indictments which set out offenses including other crimes of less magnitude or grade and it is expressly stated therein that "in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter or negligent homicide." This language and the fact that murder, manslaughter and negligent homicide are treated together in Chapter 1, of Title II of the Louisiana Criminal Code show that the Legislature considered that negligent homicide was an offense of less magnitude or grade than murder or manslaughter and included in the latter two as a lesser offense.

Counsel for the defendant argues that the provisions of Article 386 of the Code of Criminal Procedure, as amended, are not applicable to the instant case because this was

not a trial for murder but manslaughter and as we are dealing with criminal law, there must be a strict construction placed upon the provisions in question against the State and in favor of the accused.

The basis of the contention is that all of the elements of manslaughter are not included in the crime of negligent homicide, and, therefore, the two are not kindred or generic. From a reading of the above quoted Articles of the Criminal Code, it is obvious that there is more difference between the elements of the crime of murder and negligent homicide than there is between manslaughter and negligent homicide. Yet, the Legislature has stated that in all trials for murder it is the mandatory duty of the judge to instruct the jury that they may find the accused guilty of either manslaughter or negligent homicide. Clearly, it was the intention of the members of the Legislature to require the judge, where the accused is charged with manslaughter, to instruct the members of the jury that they might find the accused guilty of negligent homicide. Therefore, a verdict of guilty of the lesser offense is responsive to the charge of manslaughter.

In **State v. Staples**, 148 N.W., 283, The Supreme Court of Minnesota, in discussing the question of the necessity of alleging essential elements necessary to constitute the charge for a lesser included offense in a homicide indictment had this to say:

*****defendent contends that the indictment contained allegations inconsistent with the charge of manslaughter in the second degree. If this be true, it does not help defendant's case. It only signifies that defendant's crime, instead of being treated as manslaughter, might have been treated as the more serious crime of murder. Our statute provides that the same indictment may charge murder, and also the different degrees of manslaughter, * * * * and upon an indictment for murder the jury may find the defendant guilty of manslaughter in any degree * * * * though such offense may not be described in the indictment. If "the act for which the accused is indicted is the same for which he is convicted, the conviction of a lesser degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime"; and this is true, even though it "omits to state the particular intent and circumstances characterizing a lower degree of the same crime." * * * * Defendant cannot be heard to complain that the charge on which he was tried and convicted was not so grave as the facts alleged in the indictment would warrant.

In the case of **Bradshaw v. State** 50 S. W. 359 and **Combs v. State** 108 S.W. 649, the defendants in both cases were indicted for the crime of murder in the first degree. Upon the trial of the cases, the defendants interposed the defense that the killing was purely accidental. The same defense is interposed by the appellant Barbeau

in the case now under consideration. The Court, in disposing of the defendant's contention that the crime of negligent homicide was not a lesser included offense of the crime of murder in the first degree, held that a person indicted for murder may be convicted for negligent homicide.

The Circuit Court of Appeals, 9 Cir., in **Hopper v. United States**, 142 F. 2d. 181, 184, in discussing the sufficiency of the indictment charging the defendant with evading the Selective Service Act, had this to say:

The Courts are admonished by Section 1025 of the Revised Statutes, **18 U.S.C.A. Section 556**, that "no indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

At least since **Hagner v. United States** 285, U. S. 427, the Federal Courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations.

The court further observed, 285 U.S. at page 433, 52 S. Ct. at page 420, 76 L. Ed. 861, that "upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be

found within the terms of the indictment.”

The Court in **Hopper v. United States**, 142 F. 2d 181, 185, *supra*, says:

As recently as the present year the Court of Appeals of the Fourth Circuit in **Nye v. United States**, 137 F. 2d 73, speaking through Judge Parker, has reviewed the rule of the Hagner case and its own earlier decision of similar import in **Martin v. United States**, 4 Cir., 299 F. 287. Said Judge Parker in the Nye opinion (137 F. 2d at Page 76):

“Following the decision in the Martin case we have consistently followed the rule there laid down, sustaining under a variety of circumstances indictments drawn in general terms where they set forth the ingredients of the offense as defined by statute with sufficient definiteness and certainty to apprise the defendant of the crime charged and to protect him against further prosecution for the same offense.” (citing cases)

The Court then quotes from an opinion of Judge Learned Hand in **United States v. Polakoff**, 2 Cir., 112 F. 2d 888, a prosecution involving a charge of conspiracy to obstruct justice:

The indictment merely alleged that the accused conspired “to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not more than one year and one

day." The challenge is that it should have specified who were the "officers" that were to be so "impeded." We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. Decisions such as **Heaton v. United States**, 2 Cir., 280 F. 697, and **Kellerman v. United States** 3 Cir., 295 F. 796, are of doubtful service today, when objections which do not go to the substance of a fair trial no longer get much countenance. **Hagner v. United States**, 285 U.S. 427, 431, **Berger v. United States**, 295 U.S. 78, 84; **Crapo v. United States**, 10 Cir., 100 F. 2d 996, 1000.

The Court in **Hopper v. United States**, 142, F. 2d 181, 185, *supra*, says:

This Court, too, more than once announced the principle stated in the foregoing authorities, and has adhered to the command of the quoted statute. **Woolley v. United States**, 9 Cir., 97 F. 2d 258, 261; **Zuziak v. United States**, 9 Cir., 119 F. 2d 140-141. **Cf. Ackerachott v. United States**, 9 Cir., 139 F. 2d 114, * * *

We hold that the indictment is sufficient and that the commission of the offense was amply established.

In **State v. Baublits** 27 S.W. 2d 16, 21, the defendant was indicted for the crime of murder in the second degree. Upon the trial of the case, the defendant interposed a defense of accidental killing. The defendant was convicted under this

indictment for the crime of manslaughter by culpable negligence. The defendant appealed and assigned as error that the crime of manslaughter by culpable negligence was not a lesser included offense under an indictment for murder in the second degree. The court disposed of this argument by stating that it is well settled that a conviction for manslaughter by culpable negligence can be had under an indictment for a higher degree of homicide.

In **People v. Pearne**, 50 Pac. 376, the defendant was indicted and tried for voluntary manslaughter and convicted of involuntary manslaughter. The defendant appealed, assigning as error the fact that the conviction for involuntary manslaughter under an indictment for manslaughter was a fatal variance. Statutes in effect in California applicable to manslaughter define both voluntary and involuntary manslaughter. Manslaughter was defined as follows:

“Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

- (1) Voluntary—upon a sudden quarrel or heat of passion.
- (2) Involuntary—in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution

and circumspection." The indictment charged that the defendant "did deliberately, willfully, and unlawfully kill one Ellen Dogen." The evidence indicated that the killing was not done deliberately and willfully, but accidentally and unintentionally.

The defendant insisted on appeal that since the indictment charges the crime of voluntary manslaughter that conviction of involuntary manslaughter constitutes a fatal variance.

The Court in commenting upon this assignment of error had this to say:

This position is not well taken. If this indictment had simply charged an "unlawful killing," without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary. By the additional words "deliberately and willfully" it certainly should not be held that it charges less than it did before those words were added. An "unlawful killing" is still charged, and such a killing constitutes involuntary manslaughter. It might, with the same reason, be urged that under an indictment charging a killing with malice and premeditation, a conviction for killing without malice and premeditation would not be sustained.

In the case of **Commonwealth v. Matthews**, 12 S.W., Page 333-334, the Court says:

The general rule is that one who causes

death by his negligence is responsible, whether he was at the time engaged in legal or illegal business. If the business be in character felonious, then he is guilty of murder. If legal, and homicide results from negligence and the discharge of it, it is manslaughter. This rule is, however, subject to exception; when, for instance, the act, although careless in itself, be done under such circumstances that it could not reasonably be supposed injury would result.

In **Davis v. State**, Court of Appeals of Alabama, 19 S. 2d 356, the defendant was indicted for the crime of murder in the first degree. Upon the trial the jury returned a verdict finding defendant guilty of manslaughter in the first degree. The Court instructed the jury on murder in the first degree and second degree, and manslaughter in first degree, but omitted to define manslaughter in second degree or to instruct the jury to consider that degree of homicide, from this conviction the defendant appealed. In discussing included offenses of an indictment charging murder in first degree, the **Court said:**

As stated, the indictment charged murder in the first degree, and therefore included within its terms all the lesser degrees of homicide, as well as all other offenses necessarily included in the offense with which the defendant was charged, whether a felony or a misdemeanor.

The jury having by its verdict found the defendant guilty of manslaughter in the first degree, it necessarily follows that the defendant was acquitted of the offense of murder in the first degree, and murder in the second degree, charged in the indictment.

Under **Section 320, Title 14, of the Code 1940**, it is provided that: "Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree; and manslaughter committed under any other circumstances is manslaughter in the second degree."

Involuntary manslaughter has been defined to be: "The unlawful killing of a human being without malice, either expressed or implied, and without intent to kill or inflict injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself." (Italics Ours.)

The evidence showed without dispute that the deceased came to her death as a result of gunshot wound inflicted upon her intentionally or unintentionally by the defendant. It was the contention of the State that the appellant deliberately and intentionally shot his wife.

It was the contention of the appellant that he unintentionally and accidentally shot the deceased while attempting to transfer a loaded shotgun from a front seat to a rear seat of the automobile in which the deceased with

their baby in her arms was about to enter. Under this set of facts the Court stated:

The jury may have found under the evidence introduced upon the trial that it was careless and negligent for the defendant to be riding along a public highway of Calhoun County with a double barrel hammerless shotgun, both barrels of which were loaded, in his automobile. Under the evidence the jury might have found that it was careless and negligent for defendant to attempt to move the shotgun without first unloading it, and without taking all reasonable precaution to see that it was not pointed in the direction of his wife, who was about to enter the automobile with their baby in her arms, because some of the testimony tended to show that the gun was loaded with buck shot.

The indictment upon which the defendant was tried included manslaughter in the first degree and manslaughter in the second degree. The defendant's plea of not guilty put in issue every degree of the homicide, charged in the indictment.

The Court charged the jury as to murder in the first degree, murder in the second degree, and manslaughter in the first degree, but refused to charge the jury as to manslaughter in the second degree. The Court in reversing the conviction stated:

The defendant claimed that the death of his wife was entirely accidental but it was

for the jury under all the testimony to say whether or not the defendant was negligent in handling the shotgun and whether its discharge was a result of such unintentional but negligent act. Under this aspect of the case the jury **** might well have found the defendant guilty of manslaughter in the second degree.

This case was considered by the Supreme Court of Alabama, **19 S. 2d 358**, and the Appellate Court was sustained. The Supreme Court said:

But when there is a trial on an indictment for murder in the first degree which includes every degree of criminal homicide, it is error for the court to refuse upon written request to instruct the jury upon the law of manslaughter unless there is an entire absence of evidence tending to show that the killing was under such circumstances as to reduce it to manslaughter.

We agree with the Court of Appeals that there is **not** an entire absence of evidence as recited in their opinion tending to show that the killing was under such circumstances as to reduce it to manslaughter in the second degree.

The indictment in this case certainly meets the requirements set down in the above-cited cases, namely, that in this case the appellant, Lilburn H. Barbeau, was convicted of the crime of unlawfully killing Paul Gunn. Whether or not he was convicted of the crime of

murder in the first degree, or manslaughter by culpable negligence, it is submitted that he knew at the time the indictment was returned that he was being tried for the unlawful killing of Paul Gunn.

If the reasoning in these cases is not sound, then in every murder case where the defendant interposed the defense of accidental killing and the evidence warrants only conviction for manslaughter by culpable negligence, the administration of justice would be unduly hindered if not completely defeated. We submit that the defendant was aware of the charge of which he was being tried, in view of the fact that counsel in their opening statement stated, "The shooting which occurred on the date alleged, was simple--pure accident without the fault of the defendant (R. Vol. II P. 4)." Without reference to the more serious crimes necessarily charged in the indictment, the only reasonable inference that can be drawn from the statement of counsel for the defendant is that the defendant and his counsel were aware that the defendant was criminally liable for the killing of the deceased if the evidence showed the defendant's act of shooting the deceased was committed while he was performing a lawful act in a culpably negligent manner. In its opinion, (R. Vol. I P. 57) the trial Court held that all of the requirements of the 6th amendment of the Federal Constitution, providing that, "The accused shall enjoy the right * * * to be informed of the

nature and cause of the accusation," were met by stating in substance that a bill of particulars should have been requested, if, as the defendant contends, he was not informed of the nature and cause of the accusation. However, the Court held that such contention was without merit and rightfully so, we believe.

In the case of **State v. Stanford**, 15 S. 2d, 817, supra, at page 819, the Court, in passing on the sufficiency of the indictment from a constitutional standpoint where the applicable provisions of the state constitution is identical to applicable provisions of the 6th amendment of the Federal Constitution, stated:

The above quoted provision of the Constitution guarantees the defendant in a criminal prosecution that he shall be informed of the nature of the charge against him. The defendant knew that he was charged with the crime of manslaughter and that the Legislature had authorized the judge even in murder cases to instruct the jury that they might return a verdict of negligent homicide and, consequently, the defendant knew, since he was charged with manslaughter, that the court was also authorized to instruct the jury that they might return such a verdict. Counsel for the defendant has not referred us to any authority holding that where the jury returned a verdict of a lesser offense included in a greater one that such a verdict would be null and void, in violation of Article I of Section 10 of the Constitution of 1921. The Legislature, in the

above quoted Articles of the Louisiana Criminal Code and the Code of Criminal Procedure, has treated the homicides as murder, manslaughter and negligent homicide as kindred and generic and has informed the accused that if he is charged with either of the two greater offenses, then the judge shall instruct the jury that they may bring in a verdict for the lesser of offense.

From the foregoing it is submitted that the accused was informed of the nature and cause of the accusation against him; that he was not misled by the indictment as to the charge against him; and that he has not been prejudiced by the indictment not setting out in more detail the crime of which he was convicted.

THIRD POINT: 3. THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CONCLUSION OF THE EVIDENCE OF THE PLAINTIFF.

FOURTH POINT. 4. THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CONCLUSION OF THE EVIDENCE IN THE CASE AND AFTER BOTH PLAINTIFF AND DEFENDANT HAD RESTED.

The appellant's third and fourth assignment of error has been covered by the arguments on the first and second points.

FIFTH POINT. 5. THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE

VERDICT; THE VERDICT WAS NOT AGAINST LAW; AND THE INDICTMENT DOES CHARGE THE OFFENSE OF WHICH DEFENDANT HAS BEEN CONVICTED.

The point that the verdict was not against law has been fully covered by arguments on first and second points.

The testimony of the appellant that he was pointing an automatic pitol at the deceased who was only a few feet away from him while loading the pistol, was certainly sufficient evidence to submit to the jury the question of culpable negligence on the part of the appellant (R. Vol. V, 436, 456, *supra*).

It is believed that the appellant will admit that Court's instructions in this case adequately and correctly defined the meaning of "culpable negligence" as used in the Alaska Statute. A review of the cases cited in appellant's brief does not indicate, nor do we believe that appellant contends, that the instructions in this case were not proper. Therefore, if the indictment in this case states facts sufficient to constitute the crime of "negligent homicide" by "culpable negligence," and meets the requirements of the 6th Amendment, which we submit it does, then the appellant has no complaint as to the instructions defining culpable negligence (R. Vol. 1, 13-14).

SIXTH POINT: 6. (a) THE COURT DID NOT ERR IN OVERRULING THE MOTION OF THE DEFENDANT, MADE AT THE CONCLUSION OF ALL THE EVIDENCE, TO EXCLUDE FROM THE EXHIBITS TO BE TAKEN BY THE JURY, THOSE EXHIBITS RELATING TO THE QUESTION OF MOTIVE.

6. (b) THE COURT DID NOT ERR IN PERMITTING THE PLAINTIFF'S EXHIBITS 9 AND 10, BEING UNSIGNED PURPORTED STATEMENTS OF THE DEFENDANT, TO BE TAKEN BY THE JURY WHEN THEY RETIRED TO CONSIDER THE CASE.

Point 6 (a). It is true that the trial Court took from the jury the question of murder in the first degree. It submitted that this question was taken from the jury only because the plaintiff had not proved the essential element of "premeditation"; but it is submitted that evidence of motive is competent to show intent, malice, and purpose on the part of the accused to commit the homicide, which are necessary elements of the crime of murder in the second degree.

Underhill's Criminal Evidence, Fourth Edition, Section 559, at Page 1094, has this to say:

The motive of one charged with and being prosecuted for murder need not be established, although it may be; and where

circumstantial evidence is relied upon, it is especially proper that motive be shown. Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that the defendant did kill him. **The absence of motive does not require that the accused shall be acquitted, though it may be considered in determining the presence of intention.** (emphasis ours)

At page 1099, supra, the writer states that it is relevant to show:

that the deceased had procured the indictment or arrest of the accused, or was a witness against him, or a friend or relation of his, in some judicial proceeding then pending or soon to be begun.

The text writer, at page 1102, supra, says:

Evidence tending to show the concealment of a prior crime as a motive for the killing is admissible. Likewise, evidence tending to show the desire to remove an important witness against accused in a criminal case, is admissible.

It is submitted that plaintiff's exhibits 9, 10, 11, 12 and 13 tended to show that the appellant had a motive to kill the deceased, and this motive would and did tend to establish intent, malice, and purpose on the part of the appellant to kill the deceased. The investigation

by the police of the theft of the transmission, the presence of the stolen transmission in the appellant and deceased's car, which was established by the police and made known to the appellant, certainly was relevant testimony tending to establish intent, malice, and purpose.

It is submitted that there was no error on the part of the trial Court in submitting the referenced exhibits to the jury on the second degree murder charge.

Point 6 (b). The Court did not err in permitting the plaintiff's exhibits 9 and 10 to be taken by the jury when they retired to consider the case. In the case of **Armstrong v. United States**, C.C.A. 9th 16 F. 2d P. 62, where the defendant was convicted for possession of property for the manufacture of liquor, etc., the plaintiff assigned as error the fact that the Court admitted in evidence certain articles. It appeared from the record that a witness had testified to the possession of the above-referred property without objection; and thereafter, the referenced property was introduced at the trial. No objection was made to the testimony of the witness or to the introduction in evidence of the property which the witness had testified in regard to. The Court, at page 64, stated:

This testimony being before the Court without objection as to the finding of the stills, the condition in which they were found, the temperature disclosed, the 395

gallons of liquor which the witness saw, when the record further discloses that "thereafter, certain other witnesses were sworn and testified for the government and for the defendant," even though we should conclude that the stills and the liquor were erroneously received, there is nothing before the Court to show that this act, if error, is in any sense prejudicial to the defendant.

The Court goes on to say that the complaining party must show that he was denied a substantial right in the introduction of evidence before a reversal will be made. In the case of **United States v. McCann**, et al, C.C.A. 2d. 32 F. 2d 540, the defendant appealed from a judgment of conviction for using the mails to defraud. Error was assigned, and it was claimed sufficient to reverse the judgment because the court did not limit the effect of the statement of one of the witnesses which was offered in evidence. The court, in commenting upon this assignment of error at P. 541 stated:

No objection was made by the appellant, nor was request made to limit the exhibit, as applying only to defendant, J. J. McCann. J. J. McCann was acquitted. In the absence of some request restricting the use of this exhibit, no reversible error is established. * * * Since the passage of Section 269 of the United States Judicial Code (28 U.S.C.A. Section 391) the burden is on the appellant to show from the record as a whole that there was denial of a substan-

tial right. * * * cases cited * * The contents of this exhibit was merely cumulative, and there is ample evidence without it to sustain the statement therein contained as against each of the appellants. Nor was it error to admit the letters containing the signatures of fictitious names, for it was established that these names were signed in the offices of the respective concerns, and the letters were mailed in the due course of business from that office.

Is is submitted that the appellant Barbeau has not sown from the records as a whole that there was denial of a substantial right. In fact, it is hard to imagine how a substantial right of the appellant could have been denied since all the documents which the appellant requested be withheld from the jury pertain to motive which was necessary and competent to establish murder in the second degree. Since the defendant was not found guilty of murder in the second degree, it appears that if there was error, it was error without prejudice. It is inconceivable, it appears, to infer that the jury, by any stretch of the imagination, could have used the exhibits in determining the defendant was guilty of the crime of negligent homicide.

SEVENTH POINT: 7. THE COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION IN ARREST OF JUDGMENT (R. Vol. I, P. 36). (erroneously number 6 in Appellant's brief P. 6)

This point has been covered in the argument on the first and second point in the appellee's brief.

LAST POINT. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF SECOND DEGREE MURDER MADE AT THE CONCLUSION OF THE TRIAL AND AFTER BOTH SIDES HAD RESTED. (The Appellant's last assignment of error)

Argument on this point is covered in appellee's argument on Point 6 raised by appellant.

CONCLUSION

An examination of the entire record fails to reveal any error on the part of the Court which would warrant reversal. In fact, the instructions on the lesser degree of homicide of which the appellant was convicted was obviously most favorable to him. The appellant was ably represented by two attorneys who, in their opening statement and by requesting instruction on manslaughter by culpable negligence, refute any claim of appellant that he was not aware of the fact that he was also being put on trial, under the indictment for murder, for the crime of negligent homicide. No legitimate reason exists for upsetting the verdict, since it appears the appellant had a fair and impartial trial.

Respectfully submitted,

RALPH E. MOODY

Assistant United States Attorney
Anchorage, Alaska
Attorney for Appellee



No. 12,715

IN THE

United States Court of Appeals
For the Ninth Circuit

LILBURN H. BARBEAU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

GEORGE B. GRIGSBY,

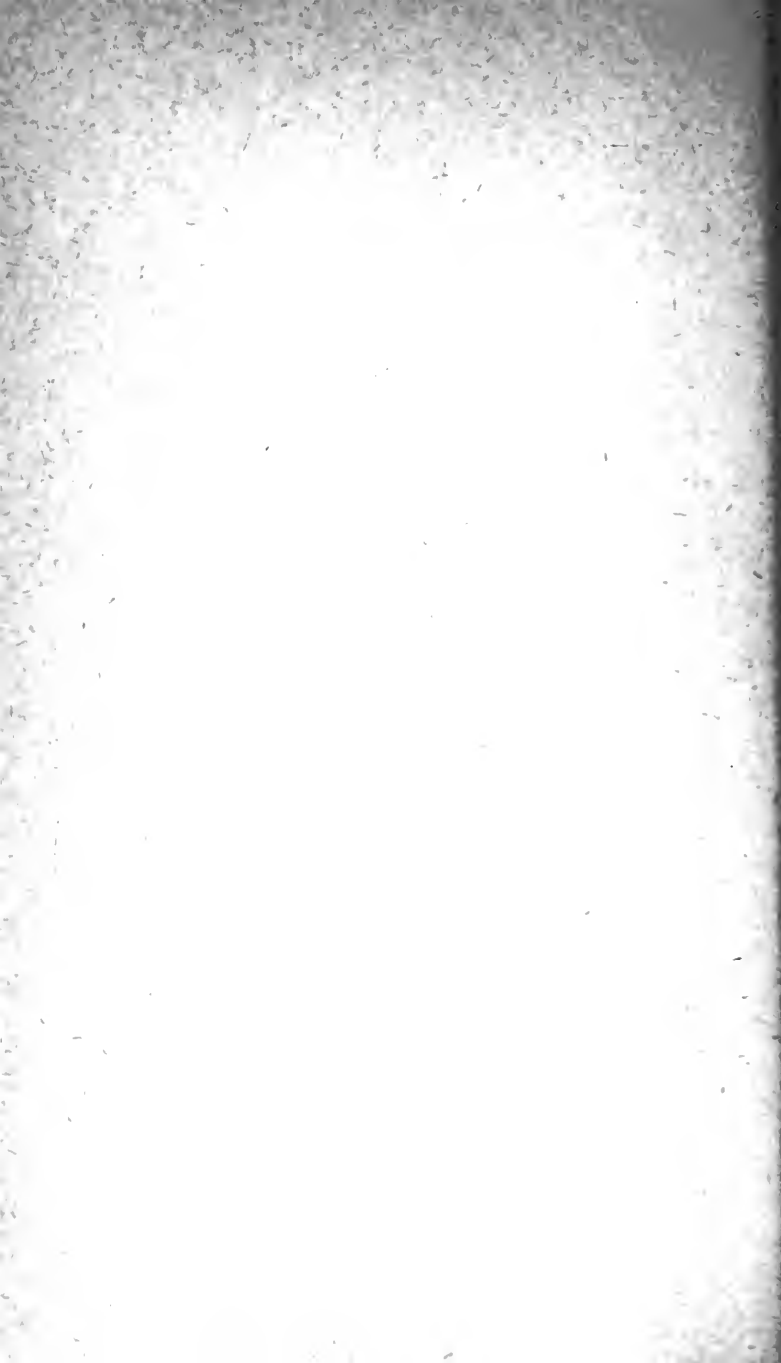
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and Petitioner.*

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No. 12,715

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LILBURN H. BARBEAU,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The above named appellant, Lilburn H. Barbeau, presents this his petition for rehearing in said cause, and in support thereof respectfully represents:

I.

PRELIMINARY STATEMENT.

It is my contention, as counsel for the petitioner, that it is apparent from the whole record of this case that the defendant did not have a fair trial. I contend also that the arguments contained in the brief of appellant have not received due consideration by the distinguished jurist who wrote the majority opin-

ion in this case. I will state further that I am impelled by a sincere belief in the innocence of the defendant, and the conviction that he did not have a fair trial.

The burden is upon me to convince this court that its majority opinion is unsound. To do this I labor under the necessity of attacking the opinion as if it were a reply brief of the government. My confidence in the ultimate fairness of this court warrants the assumption that I may safely do so. Yet it is with some degree of temerity that I venture the assertion that in my opinion the majority opinion impresses me as more characteristic of the brief of a prosecutor than a judicial opinion.

I have some authority which approves my venturesomeness.

In a volume entitled "Effective Appellate Advocacy", by Fredrick Bernays Wiener, of the District of Columbia Bar, formerly assistant to the Solicitor General of the United States, I find the following:

"Section 82, Petitions for rehearing.—Petitions for rehearing can be more poetically—and more accurately—labeled as 'Love's Labor Lost'.

"The normal petition for rehearing has about the same chance of success as the proverbial snowball on the far side of the River Styx."

And the chapter concludes with:

"A brief should be written to persuade; *it should pull no punches*; but it must be honest, and it must be accurate." (Italics mine.)

I shall heed these admonitions to the best of my ability.

II.

THE DEFENDANT DID NOT HAVE A FAIR TRIAL

If, after a review of the whole record in this case, one is left in doubt as to whether or not the defendant had a fair trial, then the judgment of conviction should not stand.

I say the defendant did not have a fair trial because: First, He was compelled to defend himself against an indictment charging murder in the first degree, an indictment found, as the event proved, without sufficient evidence to support it—all the witnesses, except one, who testified before the Grand Jury also testified at the trial, and many more, yet after all the evidence was in, the court instructed the jury to acquit the defendant of murder in the first degree. Many hours were consumed by the prosecution in an effort to prove that Barbeau was a thief and committed a murder to avoid detection, yet after thorough investigation by the police department the car with the alleged stolen transmission in it was returned to Barbeau, and he was never charged with or arrested for larceny. There can be no doubt whatever that some members of the jury must have been impressed, as is always the case, with the arguments and views of the district attorney in support of the murder charge, and the larceny charge, and that their verdict of guilty of manslaughter by culpable negli-

gence was at least to some extent the result of the defendant being held before their eyes for days as a murderer and a thief.

A coroner's jury investigated the death of Paul Gunn a short time after the homicide and no arrest or bind-over resulted therefrom. The record shows that the witnesses at the inquest were witnesses at the trial, and included only those who were present at the scene of the homicide when it occurred or shortly thereafter, and whose testimony was limited to the facts pertaining to the shooting and circumstances connected therewith.

I say there was no arrest or bind-over as a result of the coroner's inquest. An examination of the original indictment, which was transmitted by the clerk of the District Court to the clerk of this Court of Appeals, will disclose that on the back thereof is the endorsement "Secret", which means that the case originated with the grand jury, that the defendant was neither in custody nor on bail, consequently could not have been arrested nor held to answer, which would have been the result of a finding by the coroner's jury unfavorable to Barbeau.

It may fairly be inferred that the disposition of the case by the coroner's jury was not unfavorable to Barbeau.

Had Barbeau been tried for manslaughter by culpable negligence, and that crime alone, by a jury not influenced by the ill-founded accusations of murder and theft, it is a foregone conclusion that their ver-

dict would have been "Not Guilty". The verdict returned was a compromise verdict. Therefore I repeat that Barbeau did not have a fair trial.

Second: Murder in the second degree should not have been left in the case.

In its opinion this court states (page 8): "In any event, since Barbeau was not convicted of second degree murder, he cannot now claim prejudice on his appeal."

On the contrary, it was the very fact that an ill-founded charge of murder in the second degree was left in the case that lessened Barbeau's chance of acquittal on the charge of manslaughter by culpable negligence. His acquittal of second degree serves only to support my contention that the charge was ill-founded. All the evidence, all the arguments and contentions of the district attorney which would have supported his contention that Barbeau was guilty of murder in the first degree were left in the case, and affected his chances of acquittal of the crime with which he was not charged, but of which he was convicted.

III.

MURDER IN THE SECOND DEGREE.

Under some circumstances, as in the present case, it is extremely difficult to draw the line between murder in the first and second degrees. At common law there were no degrees of murder. The distinction is

statutory. Our statute states that whoever purposely and maliciously kills another is guilty of murder in the second degree. The indictment here adds the words, "and of deliberate and premeditated malice". Our district court has time and again instructed juries that no particular length of time is necessary for deliberation and premeditation, that any length of time, however short, is sufficient. That it is sufficient if the purpose of killing is weighed long enough to form a fixed design to kill. The weight of authority supports this view.

In the present case, evidence concerning a stolen transmission was admitted to show motive for murder, and intent and purpose to kill. This evidence remained in the case to show intent and purpose to kill. Under the circumstances of this homicide, could Barbeau, with a motive to kill, have formed the purpose to kill, and fired the fatal shot, without weighing that purpose long enough to "form a fixed design to kill", thus becoming guilty of murder in the first degree?

In this case the difference between the quantum of evidence necessary to sustain a charge of first degree murder, and that necessary to sustain a charge of second degree murder, is so slight as to be undiscernable.

The trial judge eliminated murder in the first degree from the case, there being no evidence whatever of deliberate and premeditated malice. There was

also lacking sufficient evidence of motive to justify more than suspicion.

My conclusion is that murder in the second degree should have been eliminated from the case, as was murder in the first degree.

Furthermore, there could not possibly have been sufficient evidence before the grand jury to make out that prima facie case requisite to returning an indictment for either degree of murder. I reiterate what I stated in appellant's brief on appeal, that the U. S. Attorney procured this indictment either in the hope of securing more evidence before the trial, or else to facilitate the conviction of a lesser offense, which purpose was accomplished. It is a well known fact that grand juries are generally rubber stamps for the district attorney, as inevitably some petit jurors are prone to be. Occasionally grand juries rise to an exaggerated sense of their omnipotence, get out of hand and go hog-wild, uncontrolled by prosecutors, or even judges, but this is on rare occasions.

IV.

MOTIONS FOR ACQUITTAL AND IN ARREST OF JUDGMENT.

At the conclusion of all the evidence the defense moved for judgment of acquittal, which if granted would have disposed of the crime charged in the indictment and all included offenses. (T.R. Vol. V, pages 507-509.) Thereafter, pursuant to Rule 29(b),

on July 5, 1950, motion for acquittal was filed (probably out of time). (T.R. Vol. I, page 28.)

Motion in arrest of judgment was filed July 5, 1950. (T.R. Vol. I, page 36.)

V.

THE MAJORITY OPINION.

On page 5 of the opinion this court states several propositions which I believe are untenable, as follows:

1. "On the appeal, this court does not look to the words of the indictment alone in order to judge of its sufficiency."

This is true if the court means that it may draw legitimate inferences from the words of the indictment. It cannot be true if it means that the court can look elsewhere than at the indictment to determine its sufficiency.

2. That Rule 52(a) of the Criminal Rules may be invoked to cure an indictment otherwise defective, stating that this rule is a restatement of former Sec. 556 of Title 18. The rule is also a restatement of Sec. 391, Title 28, which provided:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

See volume entitled "Federal Rules of Criminal Procedure with Notes and Institute Proceedings," published by the New York School of Law in 1946, with notes prepared under the direction of the advisory committee, appointed by the United States Supreme Court, page 88, Rule 52(a).

I am confident that a brief consideration of the authorities will convince the court that it has misapplied the harmless error rule.

Both Sec. 556 of Title 18 and Sec. 391 of Title 28 were the law for a long time prior to the adoption of the Federal Rules of Criminal Procedure. These statutes have been invoked in recent years on numerous occasions to bolster up defective indictments. Their use for any such purpose is a misapplication of the purpose of these harmless error statutes. They were not enacted as cure-alls. They cannot aid an indictment defective in any substantial particular; it has been so held by the highest courts in very many recent decisions. The following is cited from *Sutton v. United States*, 157 Fed. (2d) 668-670.

"Rule 34. Arrest of Judgment. The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

“In plain words, the above rule peremptorily provides that the court shall arrest judgment if the indictment or information does not charge an offense. That this was the law prior to March 21, 1946, and at the time of the trial below, is clear from the authorities, except as to the change of time within which such motions may be made. With this minor exception, Rule 34 is merely declaratory of existing law; it does not conflict with 18 U.S.C.A. Sec. 556 or 28 U.S.C.A. Sec. 391, but should be interpreted harmoniously with these procedural statutes, and neither this rule nor these statutes impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him. Every defendant in a criminal case has the right to be informed of the essential factual elements of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation.

“Upon the subject of the necessity of an indictment or information containing every essential element of the offense, no more direct and positive statement has been found than that of Hutcheson, Circuit Judge, concurring in *Grimsley v. United States*, 50 F. 2d 509, 511, 512, as follows:

“ ‘The opinion of the majority is an extremely simple and, as I think, correct statement of the principle that two substantial things must concur before a defendant may be convicted of a felony in a court of the United States; (1) He must be charged by indictment with the commission of

a federal offense; (2) The offense must be proven against him.

“ ‘I have always supposed that as an indictment without proof cannot support a conviction, so proof without indictment cannot.

“ ‘That Congress by the Act of February 26, 1919, 28 U.S.C.A. Sec. 391, either intended or has effected the result that in federal courts proof of a federal offense is now the only matter of substance, that indictment is mere technicality, and may, when proof is ample, be entirely dispensed with, I do not believe.

“ ‘No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there is general concurrence in the statement that if “the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained.” *Sonnenberg v. United States*, 9 Cir., 264 F. 327, 328; *Wong Tai v. United States*, 273 U.S. 77, 80, 46 S. Ct. 300, 71 L. Ed. 545; *Wishart v. United States*, 8 Cir., 29 F. 2d 103, 106; *Shilter v. United States*, 9 Cir., 257 F. 724, and this even in the absence of an attack of any kind upon the indictment in the court below. *Sonnenberg v. United States*, 9 Cir., 264 F. 327, 328.

“ ‘Where the indictment has been challenged by demurrer, raising not technicality, but matters of substance, and the demurrer has been erroneously overruled, by that much more is it clear that a conviction upon such indictment must be reversed. *Moore v. United States*, 160 U.S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

“ ‘Technicality and substance are not so confused in my mind as that I can bring myself to believe that failure to charge the substantive elements of a federal offense constitutes “technical error, defect, or exception which does not affect the substantial rights” of the defendant.’ ”

“It is expressly held in the above case that an indictment is fatally defective if it omits an essential element of the offense sought to be charged; and that the right of an accused to be informed of the nature and cause of the accusation against him is a substantial right, the enjoyment of which is assured by the Sixth Amendment. Then for good measure the court adds: ‘It is not a mere technical or formal right, within the meaning of 18 U.S.C.A. Sec. 556 or 28 U.S.C.A. Sec. 391.’ ”

I cite a brief extract from the opinion of Justice Rutledge in *Kotteakos v. United States*, decided in 1946:

“If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno v. United States*, supra, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart

from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Kotteakos v. United States, 328 U.S., pages 764-765.

And the following from *Bruno v. United States* (1939), opinion by Justice Frankfurter:

"The Statute requiring appellate courts to disregard technical errors not affecting substantial rights was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. 28 U.S.C.A. 391."

Bruno v. United States, 308 U.S. 297.

This court will undoubtedly concede that the right of a defendant to be informed of the nature and cause of the accusation against him is a "constitutional norm" within the meaning of the opinion in the *Kotteakos* case.

The *Sutton* case, decided in 1946, not only brings up to date the doctrine established by the authorities heretofore cited, but clearly explains to what extent the provisions of 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391 affect the question of the sufficiency of a given indictment. The *Sutton* case clears the confusion resulting from the decisions of some courts, which, regarding these sections as cure-alls, have misapplied them in upholding indictments of doubtful sufficiency.

It is not contended in the present case that the indictment does not properly charge the offense of murder in the first degree.

It is contended, however, that it does not charge the offense for which the defendant was convicted, to-wit: manslaughter by culpable negligence.

If the indictment did not charge the offense for which the defendant was convicted it must be conceded that the court had no jurisdiction to pronounce judgment.

3. The third proposition in this court's opinion which I regard as untenable is, that Barbeau was not prejudiced by the lack of information in the indictment as to the nature and cause of the accusation against him, because he acquired that information from sources outside the indictment.

This is as much as to say, to quote the *Sutton* case, that the "indictment is a mere technicality", and may be "entirely dispensed with".

4. I also take exception to this court's statement that Barbeau knew the charge against him to the extent that he was not substantially prejudiced during the trial; that he knew the charge against him since his attorney in his opening statement to the jury said, "The shooting which occurred on the date alleged, was simon-pure accident without the default of the defendant".

That Barbeau suffered no prejudice because his attorney at the close of the government's case and

at the close of the whole case conceded that there was evidence of negligence to go to the jury; and because his counsel asked the court for instructions on the crime of manslaughter by culpable negligence, but did not ask for an instruction that manslaughter by culpable negligence was not included in a charge of murder.

In answer to these propositions let me state that the Laws of Alaska provide that after the prosecution has made its opening statement, the defendant or his counsel must then state his defense, and may briefly state the evidence he expects to offer in support of it. (Sec. 66-13-51, A.C.L.A., 1949.)

This District Court construes this statute to be mandatory, and does not permit the defense to waive the opening statement.

The indictment charged murder and all necessarily included offenses. Accidental shooting if proven would be a perfect defense to any charge directly or by inclusion set forth in the indictment. I cannot follow the reasoning of this court that the statement of defendant's counsel imputes knowledge on his part that evidence would be introduced to prove that Barbeau was guilty of homicide by culpable negligence, or that it imputes such knowledge to Barbeau.

This court, in effect, says that it was of no importance that the indictment did not charge the offense for which Barbeau was tried and convicted; that he could not be prejudiced, provided he knew what the charge was from other sources.

This court overlooks the rule of law which is approved by all authorities, without exception, which is,

“Since every person is presumed to be innocent until proven guilty, it logically follows that he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information.”

This doctrine is stated in *People v. Marion*, 28 Mich. 257, and is approved and quoted in the following cases:

State v. McKenna, 67 Pac. 815;

State v. Topham, 123 Pac. 888;

Hemphill v. State, 6 Pac. (2d) 450.

“When one is indicted for a serious offense, the presumption is that he is innocent thereof and consequently that he is ignorant of the facts on which the pleader formed his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent and has no knowledge of the facts charged against him in the pleading. *Miller v. United States*, 133 Fed. 337, 341, *Naftzger v. United States*, 200 Fed. 494, 502.”

Fontana v. United States, 262 Fed. 286.

VI.

Referring back to page 5 of the majority opinion, let me state that the facts there stated are true; that not all the facts are stated, and that the conclusions of the court from those facts appear to me unsound.

I did move for an acquittal of the crime of murder at the close of the government's case. (T.R. Vol. IV, 292.) In the course of argument on that motion and after the court had denied it, and in reply to the trial court's statement to the effect that the case must go to the jury on the matter of the homicide, I did assume for the purpose of argument that there was enough evidence to go to the jury on the question of culpable negligence, at the same time stating that the rules were not clear as to included offenses. (T.R. Vol. IV, 300.)

The motion for acquittal was renewed at the close of all the evidence and as the proceedings in connection with the argument show, was intended and understood by the court, as the court expressly stated, to cover all included offenses, including manslaughter by culpable negligence. (T.R. Vol. V, 507, 508, and 509.) The motion having been overruled except as to murder in the first degree, the defense made a special motion for acquittal of murder in the second degree and a motion to instruct the jury only as to culpable negligence. The defense did not thereby waive any error committed in overruling its motion for an acquittal. Moreover the defense did not waive the question of jurisdiction. It could not waive jurisdiction. It could not stipulate jurisdiction. It appearing inevitable that the question of culpable negligence would go to the jury, the defense pursued the course which at the time seemed for the best interests of the defendant, and, I am frank to state, the question of whether manslaughter by culpable negligence was an included offense, was not under serious consideration

at the time, as appears from my remarks at the close of the government's case, to which reference has been made. As the court states, I did not ask for an instruction that manslaughter by culpable negligence was not an included offense. And for the above reasons.

I did subsequently raise that question, by motions for a new trial, in arrest of judgment, and for judgment of acquittal, which were denied by the court, its written opinion appearing in T.R. Vol. I, page 44.

This court has followed this opinion in its decision. I believe erroneously. Be that as it may, I repeat, that the indictment in this case cannot be saved by Rule 52(a), or on any of the grounds stated in this court's opinion on page 5, but if saved at all it must be on the ground that homicide by culpable negligence is necessarily included in a charge of murder in the first degree, and I shall now proceed to discuss that question.

VII.

NECESSARILY INCLUDED OFFENSES.

On page 4 of the opinion this court states,

"The courts of California, Idaho, Montana, Oregon, and Washington have all held that a charge of murder will support a conviction for the crime of manslaughter"

and

"All of these decisions state the generalization that *all* degrees of homicide which the law will

punish are included in a charge of unlawful killing, so long as the verdict finds a lesser degree of homicide than was charged in the indictment."

This court proceeds to state,

"We regard the logical extension of these cases in the Western states as the sound view on the question before us."

This might be true if the "generalization" stated were itself logical and did not lead to an absurdity, but it does.

I say that the generalization would be true if it were qualified by the addition of the words, "provided the indictment charges the lesser degree of homicide".

As stated in my brief on appeal, the Alaska Code defines manslaughter as an unlawful killing which is not murder in the first or second degree. (A.C.L.A. 65-4-4.) Then in separate sections the code enacts that any person who shall cause the death of another, by procuring another to commit self murder, by abortion, by a physician administering poison, etc., and by negligent homicide, "shall be deemed guilty of manslaughter".

The generalization states that all degrees of homicide which the law will punish are included in a charge of unlawful killing, so long as the verdict finds a lesser degree of homicide than was charged in the indictment.

Does that apply to manslaughter by abortion? Unless such offense was specifically stated in the indictment?

Or to any other species of manslaughter, separately defined by the code, including negligent homicide? Certainly not. The generalization is not sound. It is absurd.

It is founded on a sophistic syllogism, thus,

An indictment for murder necessarily includes a charge of manslaughter.

Homicide by abortion is manslaughter.

Therefore homicide by abortion is necessarily included in an indictment for murder.

“The juggle of sophistry consists, for the most part, in using a word in one sense in the premise, and in another sense in the conclusion.” (Cole-ridge.)

On page 6 of the court's opinion is the statement, “Nothing in this opinion is in conflict with our decision in *Giles v. United States*, 144 Fed. 2d 860.”

In my brief on appeal I cited the *Giles* case for one purpose only, to quote the concise and absolutely sound definition of a “necessarily included offense” which this court, and the judge who wrote the opinion in the present case approved, as follows:

“To be necessarily included in the greater offense the lesser must be such that it is impossible to

commit the greater without having first committed the lesser.”

The foregoing is an able statement of the law and the consensus of opinion of all the authorities except those, mostly western states, which notoriously dispense with constitutional requirements and ignore the principle that the defendant is entitled to be informed of the nature and cause of the accusation against him. And this means by the indictment, and from no other sources.

The foregoing quoted statement is worthy of the eminent jurist who first uttered it and of the approval of this court. The doctrine of the decisions of the western states is not, and I am at loss to comprehend why this court should discard sound for fallacious reasoning for the sake of the “struggle to break away from the early formalism of criminal pleading”, as the court expresses it on page 2 of the opinion.

Rule 31(c) is a restatement of existing law, 18 U.S.C. 565. It is from the Act of June 1, 1872, and ever since that date at least, and probably before that, there have been convictions of lesser and included offenses. The charge of negligent homicide is neither *included nor necessarily included* in a charge of murder in the first degree. It is repugnant to and inconsistent with the latter charge. If permitted at all in an indictment for murder it should be set off in a separate count. Is there anything reactionary in letting a defendant know from the indictment exactly for what offense he is on trial?

This court in its opinion admits that the question under discussion is not completely settled. If the court's decision is to stand, then the question will have been settled and a vicious precedent established.

VIII.

THE WESTERN STATES.

One of the western decisions upheld an indictment for manslaughter in the following form:

“On the.....day of....., at A unlawfully killed B.” Concerning which another western judge stated, “This form of indictment would cover every homicide committed since Cain slew Abel.”

And in *People v. King*, 27 Cal. 507, decided in 1865,

“If the defendant is guilty, *he stands in need of no information* to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.”

In *People v. King*, the court remarks on the change in pleading and practice in criminal and civil actions, stating:

“Both are fruits of the progressive spirit which, in modern times, has endeavored at least, to do away with the mere forms and technicalities of the common law.”

If that opinion expresses the "progressive spirit", then I am an ultra-conservative.

The California jurist was just one step behind the vigilantes. Up to date no federal court has irrevocably carried this progressive spirit to such ridiculous lengths.

It is difficult for me to ascribe the opinion under attack, to this court, or to the learned jurist whose name appears as the author. I have diligently followed the decisions of this court ever since the days of the "Spoilers" of 1900. I argued my first case before this court in 1910. My colleagues and I have had confidence in, and have looked upon our Court of Appeals with a feeling akin to pride, if not reverence. My present feeling is more akin to mortification. As I intimated at the outset, the opinion in this case impresses me as would the brief on appeal of a prosecuting attorney, in a frantic effort to sustain a conviction by fallacious reasoning, and as a last resort, by invoking the harmless error rule, which is habitually misapplied by prosecuting officers in their efforts to sustain defective indictments, and if in this petition I have "pulled no punches" it is because I am constantly laboring under the impression that I am writing a reply to the brief of a prosecuting officer.

IX.

**THE MERITS OF THE CASE ON THE FACTS AND THE LAW AS
EXPRESSED IN THE DISSENTING OPINION.**

I am laboring under somewhat of a handicap in discussing the facts of this case for the reason that my views have already been expressed in a clear, concise, lucid, and emphatic dissenting opinion. The majority opinion necessarily must have been written with full knowledge, and after some consideration of those views.

With respect to law points involved the dissenting opinion in one respect does not reflect my views. It states that pages of testimony and certain exhibits are in the case relating to a possible wrong doing relating to an automobile in the interest of showing a motive for the killing, and that the jury should have been instructed that this testimony was applicable only to the degree of homicide above "manslaughter by culpable negligence" since that crime imports no intent to kill.

My position is and was that this testimony should not have been allowed to go to the jury because evidence of motive had no bearing on the crime of murder in the second degree as distinguished from murder in the first degree; that under the facts and circumstances of this case the line between first and second degree murder was so faint as to be undiscernable, and that first degree murder having been eliminated from the case, second degree murder should have gone out also, thus partly removing the prejudice already created by ill-founded accusations, and thus preventing

further prejudice by argument of the district attorney in support of those accusations of murder and theft.

As to the statement in the dissenting opinion that in the crime of "manslaughter by culpable negligence imports no intent to kill", I have expressed a different view. In my brief on appeal on page 24, I cited *Reed v. Madden*, 87 F. (2d) 851 (1) as approving the following:

"To make negligent conduct culpable or criminal and make it manslaughter, the particular negligent conduct of the defendant must have been of such a reckless or wanton character as to indicate on his part utter indifference to the life of another who is killed as a result thereof. Thus only may the criminal intent, so essential in a criminal prosecution, properly be found by the jury. It is difficult to ascribe to Reed either any intent to injure, or this essential degree of wanton and reckless conduct, under the circumstances and conditions by which he was surrounded. * * *"

And I requested an instruction quoting the above statement of the law, which the trial court refused.

I do not believe that facts of the homicide itself could have possibly convinced the jury beyond a reasonable doubt, that the negligence of Barbeau was of such reckless and wanton character as to indicate on his part utter indifference to the life of another, or the criminal intent essential to justify a conviction. The motion for acquittal made after the close of the whole case, as expressly understood by the court, covered all grades of homicide and should have been granted.

X.

THE FACTS.

The statement in the majority opinion of admitted facts, beginning on page 6 and ending with the first paragraph on page 6 and 7 is extremely accurate and fair with one exception.

Referring to the time of the homicide, the opinion states, "He (Gunn) and Barbeau were at that time suspected by the police of stealing the transmission which had recently been put in the car."

The testimony showed that at that time they *had been* under suspicion, the matter had been thoroughly investigated, both men had been questioned, the car which had been taken by the police and kept several days, returned to them, together with the transmission, and no arrest made. Apparently they were no longer under suspicion.

In the next paragraph, however, there is a misstatement, fair enough perhaps from the standpoint of a district attorney making a closing argument, and feeling safe from interruption, but not fair from a judicial standpoint.

The opinion says:

"There was a conflict in the evidence as to whether Barbeau had put the safety mechanism on the gun before shoving the clip into the gun. He stated to the police that *after* he fired his gun he put it 'on safety'. Inasmuch as the court seems to indicate that the question of the degree of Barbeau's negligence hinges on the testimony as whether the safety was on or off, let us analyze the testimony further."

This court should have added to its statement, "He stated to the police that *after* he fired his gun he put it 'on safety' ", the words, "At least a policeman so testified". From my experience there is no such conclusive presumption of truth attached to the testimony of policemen as to render their testimony immune to discredit. My own experience has been to the contrary. When responsible for, or interested in a prosecution policemen are at least not over-inclined to favor the defendant. It could have been, that chagrined at being unable to pin a theft on Barbeau, they instigated this prosecution, or at least were in sympathy with it. What a policeman said he was told should not be taken as conclusive proof of the ultimate fact.

This court leaves the issue on this crucial issue as disposed of by a recital of what the police testified that Barbeau said, and what Barbeau later testified to be the fact, and then says:

"The jury resolved this conflict against Barbeau, and this finding is sufficient to sustain a finding of culpable negligence."

This is an extremely limited condensation of the conflicting testimony, and indicates a very cursory examination of the record by the writer of the opinion. The record shows that Barbeau was questioned with respect to this testimony of the police and denied it emphatically. Barbeau's testimony on the subject was as follows:

Q. And when he handed you the gun what did you then do?

A. Whenever he handed me the gun we were sitting just about like this facing together and Mr. Gunn was sitting practically the same position as Mr. Grigsby, possibly a little further over to my left, he handed me the gun. I took it, ejected it to see if there was a shell in it, picked up the clip, jammed it in and that is when it went off.

Q. Now, do you know, Mr. Barbeau, whether or not when you pulled the slide back to see whether there was anything in the chamber whether or not the slide went forward or remained back?

A. No, I don't because I always load a gun in the same way. I look at the gun and put the clip in and then eject the chamber and then drop the extra shell into the barrel and leave it go forward and it is on safety. The chamber is supposed to go back and it will not fire in that position.

Q. What was the position of the safety on the gun which Mr. Howe handed you at the time the shot went off?

A. At the time that the shot went off the gun is exactly like it is now. It was on safety. After the shot the gun was still on safety in this position exactly as set. It was laying on the floor. As I dropped it on the floor in between me. When I picked it up I noted it again. I could see that the hammer was back and I was in position and I thought that the gun may go off again and I reached down and picked the gun up and released the hammer in the same position as I did there. As I picked the gun off the hammer went forward because the barrel wasn't completely

forward and the gun was laying on the floor in this position. It was like that. And when I saw the hammer was back and I went and picked it up and released the hammer. (T.R. Vol. V, 440-441.)

And, the proper impeaching questions having been put to the policeman, Barbeau testified:

Q. Assuming that he testified in that regard, Mr. Barbeau, that you told him at some later time that you had put the gun on safety after the shot was fired, what is the fact in that regard?

A. It isn't true because I don't—I am positive that I never did tell Mr. Fox that. And I know that the gun was on safety because when I looked at the chamber of that type of gun is why. The gun was on safety because it makes it easier to eject or pull the chamber back because you can get a thumb grip on the safety and it being on safety it is easier to pull back and that is why I know the gun was on safety.

Q. And you don't recall telling officer Fox anything about putting it on safety afterwards?

A. No, sir.

Q. You didn't tell him that, did you?

A. No, sir. (T.R. Vol. V, 446.)

Furthermore, the policeman, J. C. Fox, who gave the testimony which the court recites, on June 14, 1950, nearly four months after the homicide, testified at the coroner's inquest a few days after the trial.

He was cross-examined on this very matter at the trial with reference to his testimony at the coroner's inquest and proper impeaching questions propounded. His testimony follows:

Q. Did you at that time make any mention of his having stated that he put the gun on safety and then laid it on the floor?

A. I don't remember whether I made that statement at the coroner's inquest or not. (T.R. Vol. II, 96.)

Barbeau made a statement at the police station on the day of the shooting and shortly thereafter, Fox testified that he was present and heard the statement, as follows:

Q. At that time did he state that he put the gun on safety before he laid it down?

A. At that time in the statement he did not mention putting it on safety.

Q. He did not mention it?

A. No, he did not make the statement.

Q. And you didn't mention anything about that, although you were asked what he said, at the coroner's inquest?

A. No.

Q. About putting the gun on safety?

A. No, I didn't. That was one of the small things that wasn't brought up. (T.R. Vol. II, 96-97.)

The witness, Fox, was cross-examined as to other matters which he had stated occurred at the scene of the homicide after he arrived there, for the purpose of testing his recollection and credibility.

Fox repeatedly testified at the trial that he never picked up the gun and put it in a paper bag. Chief of Police Stowell corroborated him.

Both were successfully impeached by the reporter who took the stand with her complete notes of the testimony given at the coroner's inquest. (T.R. Vol. IV, 304-306.)

So there you have it. Instead of the meagre statement in this court's opinion of the conflict in testimony the jury resolved against Barbeau, that Barbeau told the police that *after* he fired the gun he put it on safety, and later testified that the safety was on when he fired the shot, a fair review of the testimony on this crucial matter would be as follows:

A policeman testified that Barbeau told him that after he fired the gun he put it on safety. Barbeau emphatically denied this statement and said the gun was on safety when discharged.

An expert witness, highly qualified, testified that this could well have happened, not only with this type of gun, but with this particular weapon, because of the defective safety mechanism. Another qualified expert testified to the same effect, and also from his personal experience. Both were unimpeachable.

The witness, Fox, was impeached as to his recollection, at least, by the record of the coroner's inquest.

Chief Stowell was also impeached on the same subject. Their discredited testimony was so much in accord as to be open to suspicion.

Fox testified that he did not mention the matter of Barbeau putting the gun on safety, because it was "one of those small things that didn't come up".

This court in effect states, that loading a gun, not on safety, considering the close proximity of Gunn to the defendant justifies a finding by the jury of culpable negligence.

It must be conceded that the only testimony whatever that the gun was not on safety, was the statement of Fox, as to what Barbeau told him, testimony given four months after the event, and pure hearsay, and subject to all the infirmities of hearsay, except its admissibility as to defendant's statement—testimony by a witness thoroughly impeached as to his credibility, by a witness who had the records in his hand while testifying of all the policeman's testimony.

Fox did not testify that Barbeau told him that the gun was *not* on safety before the shot, but that he put it on safety after the shot.

Barbeau could have done both, that is put it on safety before and after the shot. He could have stated that he left the gun on safety after the shot.

Barbeau says he picked the gun up and let the hammer down because he feared it might discharge again. It would have been natural for him to have seen that it was on safety at the same time. It might not have been, this being a gun capable of freakish performances. It would not have been natural for Barbeau to have inspected the gun immediately after it fired. He says he dropped or laid it on the floor, said, "My God", rushed to Gunn's assistance, later picked it up and let the hammer down.

The dissenting opinion states that the accident could have happened exactly as appellant related it,

that it seems the jury followed mere suspicion. The majority opinion justifies the verdict by its one-sided review of the testimony regarding the "on safety" proposition. The testimony on this point preponderates in favor of Barbeau. My own conclusion is that the verdict was a compromise verdict, largely brought about by the testimony admitted to sustain the accusations of which Barbeau was acquitted, which left at least some of the jurors little disposed to draw the line between negligence, and culpable negligence. The court should adopt the dissenting opinion, draw the line for the jury and refuse to sustain the argument.

CONCLUSION.

To sustain the lower court, this court has resolved all doubtful propositions of law and fact in favor of the government.

It has established for Federal Courts a precedent as to whether manslaughter by culpable negligence is included in the offense of first degree murder, on the strength of Western state decisions by judges who have forgotten that "eternal vigilance is the price of liberty", and who long ago have emerged victorious in their "struggle to break away from the early formalism of criminal pleading". Reformers are generally crusaders and always go to extremes.

On the strength of these Western decisions founded on sophistry, this court has rejected the able definition of "necessarily included offenses" approved by this very court in *Giles v. U. S.*, supra, which ex-

presses the unanimous consensus of opinion of high authority on the question of necessarily included offenses. Also were the court's opinion written as a brief for the government I would say that it distorts the evidence on the facts in favor of the government.

Why should all, at least doubtful, questions of law and fact, be resolved against the appellant? Is there any presumption in favor of the decision of a lower court on the law? Can no doubtful question be resolved in favor of the defendant?

Realizing the immense burden under which this court constantly labors, in disposing of appealed cases, some of vastly more public importance than Barbeau's case, and the additional burden a re-argument will impose, I must nevertheless earnestly request the careful consideration of this petition.

It is regrettable the rules do not permit a reconsideration without a re-argument.

I earnestly hope that this petition will escape the usual fate of petitions for rehearing, to which I have referred in the preliminary statement.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the district court be upon further consideration reversed.

Dated, Anchorage, Alaska,
January 18, 1952.

Respectfully submitted,

GEORGE B. GRIGSBY,

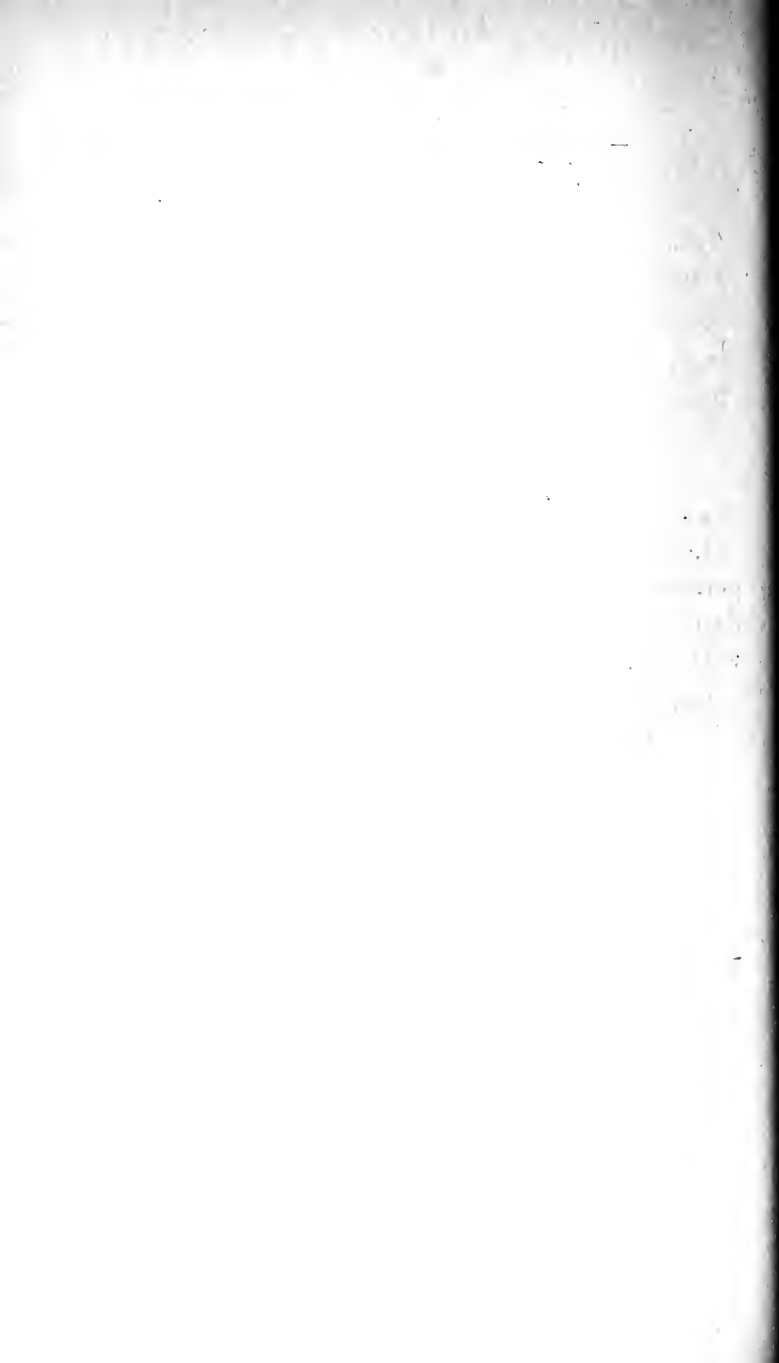
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I, George B. Grigsby, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in my judgment well founded and that it is not interposed for delay.

Dated, Anchorage, Alaska,
January 18, 1952.

GEORGE B. GRIGSBY,
*Counsel for Appellant
and Petitioner.*



No. 12717

United States
Court of Appeals
for the Ninth Circuit.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellant,

vs.

JOHN MUGAVERO,

Appellee.

Transcript of Record

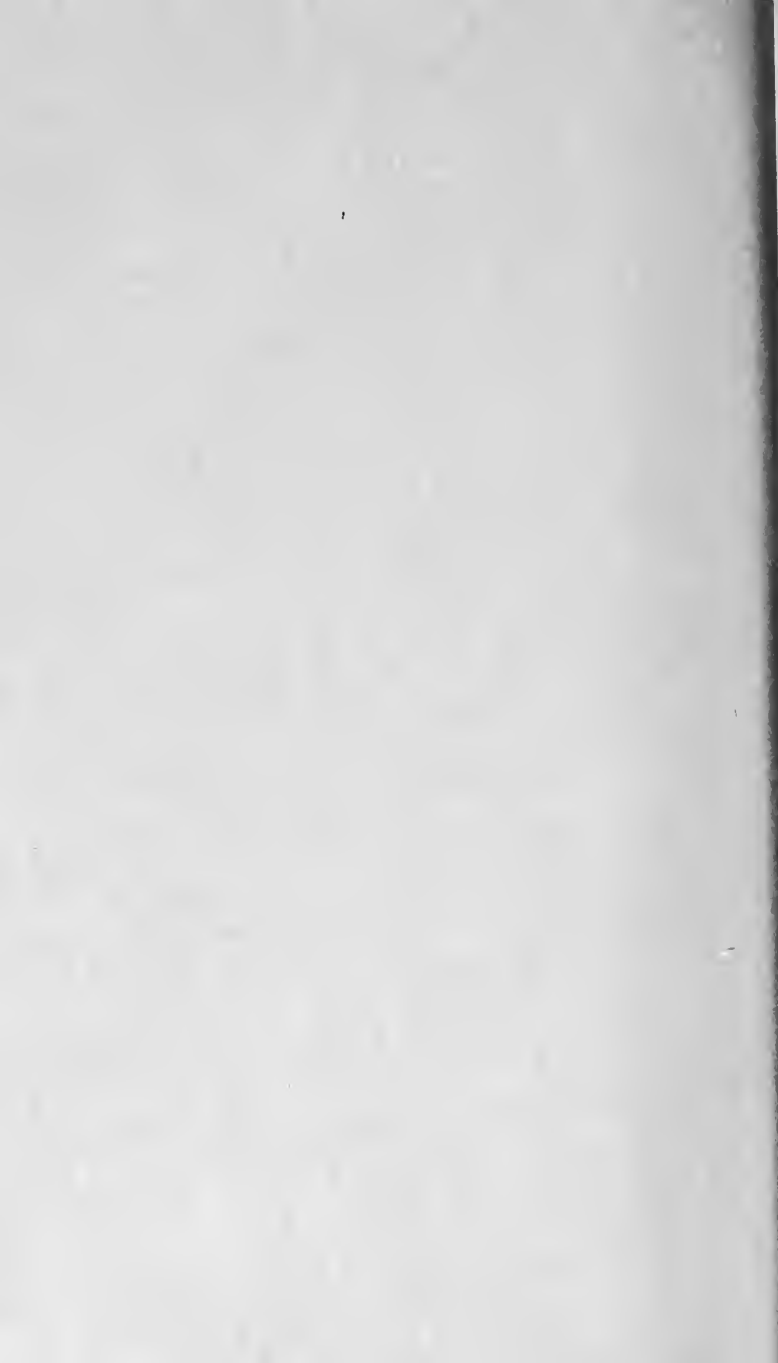
Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

DEC - 9 1950

PAUL P. O'BRIEN,

CLERK



No. 12717

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Northern
District of California, Southern Division

No. 29753

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the United States
District Court for the Northern District of
California:

The petition of John Mugavero for a writ of
habeas corpus respectfully shows:

I.

Petitioner is a citizen of the United States.

II.

Petitioner is unlawfully restrained of his liberty
by respondent E. B. Swope as Warden of the United
States Penitentiary, Alcatraz, California.

III.

Petitioner, respondent and the Penitentiary are
within the Northern District of California.

IV.

This Court possesses jurisdiction under Const.

U.S. Art. I, Sec. 9, cl. 2 and 28 USCA Secs. 1391(b), 1393(a) and 2241, et seq., to issue the writ herein-after prayed for.

V.

Petitioner is held in custody by respondent, as Warden, etc., under color of authority of the United States, that is to say, under a judgment, sentence and warrant of commitment issued out of the District Court of the United States for the Southern District of New York on the 16th day of March, 1944, in a criminal cause numbered C. 116/211 in the files of that Court, and further under a transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons, Department of Justice. Certified copies of the judgment, sentence, warrant of commitment and transfer order, together with a certified copy of the indictment in cause numbered C. 116/211, certified copy of election of petitioner to enter upon service of his sentence, certified copy of docket entries in said cause, and copy of Record of Court Commitment No. 642-AZ, United States Penitentiary, Alcatraz, California, are attached hereto, marked "Exhibit A," and made a part hereof.

VI.

The restraint and custody hereinabove referred to are unlawful and violative of the Constitution of the United States, and particularly of Amendment V thereto, in that petitioner is thereby for the

same offense twice placed in jeopardy as hereinafter more particularly appears.

VII.

On or about the 30th day of November, 1943, petitioner and certain other persons met near a terminal of the Rapid Motor Lines, Inc., (hereinafter called "Rapid") in the City of New York. There were two loaded trucks inside the terminal. Two employees of Rapid took the two trucks (hereinafter referred to as "Truck 3" and "Truck 4") out of the terminal, parked them in the street and departed. When they returned a few minutes later, they were held up by petitioner and his confederates, taken into the terminal and there bound. Petitioner and his confederates thereupon left the terminal and were immediately arrested by agents of the Federal Bureau of Investigation.

VIII.

Accompanying petitioner and his confederates at the times referred to in Paragraph VII hereof was one James Stegman. Stegman was then and there a paid informer for the Federal Bureau of Investigation. While petitioner and his confederates were taking the two employees of Rapid into the terminal, Stegman entered Truck 3, drove it away and reported to the agents of the Federal Bureau of Investigation.

IX.

The part of Truck 4 designed for carrying merchandise and which did carry merchandise was

entirely locked, covered and sealed and all the merchandise upon said truck was under cover, lock and seal at all times referred to in this and the two foregoing paragraphs. Neither petitioner nor any of his confederates ever at any time approached, touched or entered Truck 4; nor did any of them take possession thereof or assume control thereover in any manner or form, except so far as they did so by holding up and binding the driver thereof.

X.

The merchandise on Truck 3 consisted in part of 590 cases of Park & Tilford liquors, the property of Park & Tilford Import Corporation. The merchandise on Truck 4 consisted in part of 415 cases of Park & Tilford liquors, the property of Park & Tilford Import Corporation. Truck 4 also contained vermouth, sherry, muscatel, tomato puree and Marsalla Tonic, the property of various persons. The facts alleged in this paragraph appear in the record of said cause numbered C. 116/211 by extracts from the testimony of a witness for the United States, certified copy of which is attached hereto, marked "Exhibit B" and made a part hereof, and these facts have never been controverted, contradicted, questioned or denied by any party to said cause numbered C. 116/211 or any of the later proceedings arising out of it, except that upon the appeal in said cause the Circuit Court of Appeals did not understand them to be the facts, due to an inadvertent statement in the brief of counsel.

XI.

On or about January 12, 1944, an indictment was filed against petitioner and his confederates in the United States District Court for the Southern District of New York arising out of the matters aforesaid. The indictment was in nine counts and is a part of Exhibit A hereto. The first count charged the theft from "certain trailer trucks" of 1005 cartons of Park & Tilford liquors and certain advertising matter. That is, the first count embraced the 590 cases of whiskey on Truck 3, plus the 415 cases on Truck 4. The second count covered certain other merchandise on Truck 3. The third through eighth counts, inclusive, charged various other thefts "from a certain trailer truck"; they covered the other merchandise on Truck 4. The ninth count was a count for conspiracy to commit the acts charged in the first eight counts.

XII.

Thereafter petitioner and his confederates were tried and found guilty on all nine counts.

XIII.

Petitioner was sentenced to serve five years' imprisonment on the first and second counts, said sentences to run concurrently. Petitioner was sentenced to serve five years' imprisonment on the third through eighth counts, inclusive, said sentences to run concurrently, but consecutively to the sentences on the first two counts. Petitioner was sentenced to serve two years' imprisonment on the ninth count,

to run consecutively to the sentences on the prior counts. The sentences totaled twelve years.

XIV.

The aforesaid sentences on the third through eighth counts, inclusive, were and are unlawful, void and violative of the Constitution of the United States, and particularly Amendment V thereto, in this, that petitioner by the sentence imposed on the first count was punished for stealing merchandise contained in both Truck 3 and Truck 4; that if petitioner stole the merchandise in Truck 4 at all, he did so merely by participating in holding up and binding the driver thereof and not otherwise; that the same was one indivisible and inseparable transaction; that if the same was an offense at all, it was but one offense, for which petitioner was punished by the sentence on the first count; that by being subjected to an additional sentence on the third through eighth counts, petitioner was twice placed in jeopardy for the same offense.

XV.

The legal portion of petitioner's sentence was seven years. Petitioner entered upon the service thereof on March 16, 1944. Petitioner is eligible for 10 days' good time per month, as appears by the Record of Court Commitment which is a part of Exhibit A hereto. Petitioner earned all the good time which it was possible for him to earn, namely 840 days. Petitioner's sentence was inoperative for 44 days. Petitioner accordingly completed the service of his sentence on January 8, 1949.

XVI.

Ever since January 8, 1949, the restraint of petitioner by respondent has been and it is now illegal, unconstitutional and void, and petitioner is entitled to immediate release.

XVII.

On the 30th day of November, 1947, Joseph Peter Oddo, one of petitioner's confederates in the transaction out of which his conviction arose, and one of his codefendants in said cause numbered C. 116/211, and who received a sentence similar to petitioner's, filed a motion in the United States District Court for the Southern District of New York under Rule 35 of the Federal Rules of Criminal Procedure to correct said unconstitutional sentence, as required by 28 USCA Sec. 2255, based upon the grounds hereinbefore alleged. Said motion was denied by that Court and the order denying the same was affirmed by the United States Court of Appeals for the Second Circuit. Such a motion by petitioner would be inadequate and ineffective to test the legality of petitioner's detention.

XVIII.

Heretofore and on July 20, 1949, petitioner filed in this Court his petition for Habeas Corpus based upon the same grounds hereinbefore alleged. After various proceedings thereafter taken and had said petition was finally denied on May 10, 1950, by the Honorable Herbert W. Erskine, a Judge of this Court, upon the ground that a certified copy of the record in case numbered C. 116/211 establishing the

facts alleged in paragraph X hereof was not attached to the petition therein. Said denial was without prejudice to the filing of a new petition containing such record, which is Exhibit B hereto.

Wherefore, petitioner prays that a writ of habeas corpus issue out of this court, directed to said E. B. Swope, Warden, etc., commanding him to produce the body of petitioner before this Court at a time and place therein to be specified, then and there to receive and do what the Court shall order concerning the unlawful detention and restraint of petitioner, and that petitioner be ordered discharged from the restraint and imprisonment aforesaid.

Dated: May 15, 1950.

/s/ MALCOLM T. DUNGAN.

United States of America,

Northern District of California,

City and County of San Francisco—ss.

Malcolm T. Dungan, being first duly sworn, deposes and says that he is the attorney for John Mugavero, the petitioner named in and who makes the foregoing Petition for Writ of Habeas Corpus; that he makes this verification on behalf of petitioner as permitted by 28 USCA Sec. 2242; that he prepared the foregoing Petition and knows the contents thereof; that the facts stated therein are true; that he has no personal knowledge of the facts therein stated, except the fact that petitioner is detained as a prisoner at the U. S. Penitentiary,

Alcatraz, California; that the sources of his knowledge upon the other facts therein stated are official records of the District Court of the United States for the Southern District of New York, official reports of the United States Court of Appeals for the Second Circuit, and a petition heretofore filed by petitioner in this Court and verified by petitioner; that this verification is made by him and not by petitioner for the reason that petitioner's detention would delay the verification and filing thereof, and that petitioner has been for a long time unjustly detained and is entitled to the writ with all convenient speed.

/s/ MALCOLM T. DUNGAN.

Subscribed and sworn to before me this 15th day of May, 1950.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 29, 1951.

Exhibit A

Form No. 110

United States of America,

Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate to wit, Judgment and Commitment in the case of the United States vs.

John Mugavero, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the United States the one hundred and seventy-fourth.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

District Court of the United States
Southern District of New York

C. 116/211

Violation of U.S.C. Title 18 Secs. 409 & 88

Theft of Merchandise Moving in Interstate
Commerce and Conspiracy

UNITED STATES OF AMERICA

vs.

JOHN MUGAVERO

JUDGMENT AND COMMITMENT

On this 16th day of March, 1944, upon the proceedings heretofore had herein and on motion of the United States Attorney, It Is by the Court

Ordered and Adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of Five Years on counts 1 & 2 to run concurrently.

Five Years on each of counts 3 to 8 inclusive to run concurrently, and consecutively to sentence on counts 1 & 2. Prison sentence on counts 3 to 8 to follow sentence on counts 1 & 2.

Two Years on count 9 to run consecutively to sentence on counts 3 to 8. Prison sentence on count 9 to follow sentence on counts 3 to 8.

Total Sentence—Twelve Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ SIMON H. RIFKIND,
United States District Judge.

A True Copy. Certified this 16th day of March, 1944.

[Seal] /s/ GEORGE J. H. FOLLMER,
Clerk.

#37-289

Return

I have executed the within judgment and commitment in the manner following: On March 16, 1944, I delivered said John Mugavero to the Warden of Detention Headquarters temporarily pending transfer to the institution herein designated for the service of sentence; and on Aug. 30th, 1944, I delivered said John Mugavero to the Warden at U. S. Pen., Atlanta, Ga., the institution designated, together with certified copy of the within Judgment and Commitment.

/s/ JAMES E. MULCAHY,
U. S. Marshal.

[Seal] By /s/ JOHN O. PICKETT,
Deputy.

Filed: Sept. 13, 1944, U. S. District Court S. D.
of N. Y.

United States of America,
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to wit: the docket entries in the case of the United States vs. Kingdon William DeNormand, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the Seal of the said Court at

the City of New York, in the Southern District of New York, this 30th day of September, in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the One Hundred and Seventy-fourth.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

United States District Court

Docket C 116/211

THE UNITED STATES

vs.

KINGDON WILLIAM De NORMAND, Alias
WILLIE DESMOND, Alias ROBERT L.
LONG, JOSEPH PETER ODDO, alias AN-
THONY J. DONATO, JOSEPH ALFRED
LA CASCIA, WILLIAM JOSEPH KING,
Alias KING and JOHN MUGAVERO.

VIOLATION OF THEFT OF MERCHANDISE
MOVING IN INTERSTATE COMMERCE
AND CONSPIRACY

Title 18, Sec. 409 and 88 U.S.C.

CRIMINAL DOCKET

Proceedings

1943

Dec. 14—Filed Notice of Appearance. Jacob M. Of-
fenhinder, Atty. for Jos. Oddo.

1944

Jan. 12—Filed Indictment.

1944

- Jan. 14—All five defendants Pleads Not Guilty.
Bails \$20,000 as to each. Remanded.
Jacob M. Offenhinder assigned as counsel
to defts. La Cascia and King. Goddard, J.
- Jan. 31—Henry K. Chapman assigned as atty. for
deflt. Kingdon W. De Normand. Leibell, J.
- Feb. 10—Filed Notice of Appearance. Morris D.
Reiss, Atty. for John Mugavero.
- Mar. 6—Filed substitution of Morris E. Packer as
Atty. for deflt. Kingdon William De Nor-
mand. So ordered. Follner, Clerk.
- Feb. 29—Trial begun as to all defendants before
Hon. Simon H. Rifkind, J.
- Mar. 1—Trial continued.
- Mar. 2—Trial continued.
- Mar. 3—Trial continued.
- Mar. 6—Trial continued.
- Mar. 7—Trial continued. Govt. Rests.
Defts. De Normand and Mugavero move
to dismiss each of counts 1 to 9, inclusive.
Denied Exc.
Defts. Oddo, King and La Cascia move
for dismissal of the indictment. Denied
Exception.
- Mar. 8—Trial continued.
- Mar. 9—Trial continued and concluded. All de-
fendants renew motions for the dismissal
of the indictment and for a direction of a
verdict in their favor. Denied exc.
Verdict—All defendants Guilty as charged.
3/16/44 for sentence. Defendants re-
manded. Rifkind, J.

1944

- Mar. 16—Motions as to all defendants. Motion to set aside verdict Denied Exc. Motion in arrest of Judgment Denied Exc.
- Mar. 16—Filed Judgment. Kingdon William De Normand. Sentenced to Ten (10) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and to follow sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and follow sentence on counts 3 to 8 inclusive. Sentence to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.
- Mar. 16—Filed Judgment—John Mugavero—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.
- Mar. 16—Filed Judgment—William Joseph King—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concur-

1944

rently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

Mar. 16—Filed Judgment—Joseph Alfred La Cascia—Sentenced to Five (5) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each other but consecutively to and begin after sentence on counts 1 and 2; Two (2) years on count 9 to run consecutively to and begin after sentence on counts 3 to 8 inclusive. Sentences to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

Mar. 16—Filed Judgment—Joseph Peter Oddo—Sentenced to Ten (10) years on counts 1 and 2 to run concurrently; Five (5) years on counts 3 to 8 inclusive to run concurrently with each but consecutively to and begin after sentence on counts 1 and 2; One Year and One Day on count 9 to run concurrently with sentence on counts 3 to 8 inclusive. Sentence to be at a place of confinement to be designated by the Attorney General of the United States. Remanded. Rifkind, J.

1944

- Mar. 16—Issued committment in triplicate as to all five defendants.
- Mar. 20—Filed Notice of Appeal by Kingdon William De Normand—(M.E.P.)
- Mar. 20—Filed Notice of Appeal by Joseph Peter Oddo, Joseph A. La Cascia, William J. King and John Mugavero—(M.D.R.)
- Mar. 21—Filed Remand (5) Jos. L. La Cascia, K. Wm. De Normand, Wm. Jos. King, John Mugavero, Jos. P. Oddo dated 1/14/44—Rifkind, J.
- Apr. 17—Filed stipulations extending times of Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero to serve and file bill of exceptions etc. and extending term of Court to and including July 15, 1944. So ordered. Rifkind, J.
- May 5—Filed elections to begin service of sentence by defendants John Mugavero and William Joseph King dated 5/4/44
- May 9—Filed election to begin service of sentence by deft. Joseph Alfred La Cascia 5/7/44
- May 29—Filed stipulation consolidating appeals by defts.-appellants J. P. Oddo, J. A. La Cascia, W. J. King and J. Mugavero and that appeals be porsecuted upon one record and brief. So ordered. Rifkind, J.
- June 15—Filed a true copy of Order of C.C.A. remanding this cause to District Court for the purpose of moving for a new trial. A. Bell, Clerk.

1944

- June 22—Filed stipulation extending of Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero to serve and file bill of exceptions etc. to and including 10/1/44. So ordered. A. N. Hand, C.J.
- June 26—Filed Order extending Term of Court to and including the 16th of August, 1944. Rifkind, J.
- June 29—Filed affidavits and notice of motion for an order setting aside judgment of conviction and granting a new trial as to defts. De Normand, Oddo, La Cascia, King and Mugavero—memo endorsed—Argued on 6/23/44. Motion denied 6/29/44. Rifkind, J.
- June 29—Filed exhibits and transcript of testimony of James Stegman
- June 29—Filed affidavit of John C. Hilly in opposition for motion for new trial
- July 14—Filed Order denying motion for a new trial. Rifkind, J.
- July 17—Filed Notice of Appeal as to Kingdon William De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, William Joseph King and John Mugavero.
- July 27—Filed notice by Joseph P. Oddo dated 7/23/44 electing to enter upon service of sentence.
- Aug. 7—Filed affidavit and Notice of Motion for an order extending term of Court to Dec.

1944

- 1, 1944—memo endorsed. So ordered.
Rifkind, J.
- Aug. 21—Filed notice by Joseph Alfred La Cascia dated 8/16/44 electing to enter upon service of sentence.
- Aug. 21—Filed notice by William Joseph King dated 8/16/44 electing to enter upon service of sentence.
- Aug. 21—Filed notice by John Mugavero dated 8/16/44 electing to enter upon service of sentence
- Aug. 21—Filed stipulation extending time of Kingdon W. De Normand, Joseph P. Oddo, Joseph A. La Cascia, William J. King and John Mugavero to settle and file bill of exception etc. to and including Oct. 1, 1944. So ordered. A. M. Bell, Clerk, C.C.A.
- Aug. 23—Filed Commitment & entered return Defendant Joseph P. Oddo delivered to the U. S. Pen., Atlanta, Ga., on Aug. 9, 1944.
- Sept. 13—Filed Commitment & entered return Defendant Alfred La Cascia delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 13—Filed Commitment & entered return Defendant John Mugavero delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 13—Filed Commitment & entered return Defendant William Joseph King delivered to the U. S. Pen., Atlanta, Ga. 8/30/44
- Sept. 26—Filed Order extending time of K. W. De Normand, J. P. Oddo, J. A. La Cascia,

1944

W. J. King & J. Mugavero to settle & file bill of exceptions etc. to and including Nov. 1, 1944. A. M. Bell, Clerk, C.C.A.

Oct. 10—Filed assignment of errors.

Oct. 25—Filed Stipulation extending time of K. W. De Normand, J. P. Oddo, J. A. La Cascia, W. J. King and J. Mugavero to settle & file bill of exceptions etc. to and including Dec. 1, 1944. So ordered. A. M. Bell, Clerk, C.C.A.

Nov. 15—Filed Bill of Exceptions

Nov. 15—Certified record on appeal to C.C.A. (M.D.R.)

Nov. 27—Motion to extend Term of Court—as to Defts. Oddo, La Cascia, King & Mugavero. Memo Endorsed. So Ordered. Rifkind, J. Term of Court extended to 4/1/45)

Dec. 2—Filed order extending term of Court as to all Defts. to and including April 1, 1945. Rifkind, J.

1945

Mar. 23—Filed affidavit and Notice of Motion for an order extending term of court as to defts. Oddo, La Cascia, King & Mugavero. Memo endorsed—3/19/45. Referred to Judge Rifkind—Case J.

Mar. 23—Filed order extending term of court to and including Oct. 20, 1945. Rifkind, J.

June 5—Filed two eltters to Judge Rifkind dated 10/10/44 & 5/16/45 from Kingdon de Normand.

June 5—Filed opinion #15944—motion for new

1945

trial & modification of sentence—denied.
Rifkind, J.

June 16—Mandate C.C.A. Judgment of District Court is affirmed as to Kingdon, Wm. De Normand, Joseph Peter Oddo, Joseph Alfred La Cascia, Wm. Joseph King and John Mugavero

June 22—Filed Order on Mandate with Notice of Settlement Mandate of Circuit Court of Appeals order to be made Judgment of District Court. Bright, J.

July 18—Filed Commitment & entered return Defendant Kingdon W. De Normand delivered to the U. S. Penitentiary, Leavenworth, Kansas, on July 6, 1945.

1946

May 23—Filed petition and notice of motion for Writ of Habeas Corpus for Kindon de Normand and motion to set aside verdict memo endorsed—5/10/46—application for Writ of Habeas Corpus is denied. Knox, J.—5/23/46—motion to set aside verdict denied. Mandelbaum, J.

May 23—Filed affidavit in opposition

May 29—Filed Transcript of record of proceedings, dated 5/15/46

July 23—Filed petition and notice of motion for a new trial by Kingdon De Normand—memo endorsed — motion denied — Knox, J.—7/23/46. And Petition for Writ of Habeas Corpus—memo endorsed—Petition denied 7/23/46. Knox, J.

1947

Sept. 26—Filed petition for motion for a new trial by Kingdon de Normand—memo endorsed—motion denied. Memo filed. Stephen W. Brennan, U.S.D.J. 9/23/47

Sept. 26—Filed affidavit in opposition.

Sept. 26—Filed memo decision (opinion) #17127 by Brennan, J.

Filed motion for new trial by Kingdon de Normand denied 9/24/47

1948

Mar. 1—Filed supplementary motion by Kingdon de Normand to a motion for a new trial

Mar. 1—Filed affidavit by John Helly, Asst. U. S. Atty., in opposition.

Mar. 9—Filed opinion #17358—denying motion by Kingdon De Normand for a new trial. Goddard, J.

Mar. 15—Filed letter dated 11/30/47 and reply dated 12/4/47.

Mar. 15—Filed petition & Notice of Motion by Joseph Peter Oddo to vacate Judgment and Sentence under counts three to eight—memo endorsed—motion denied. Goddard, J.

Mar. 15—Filed affidavit in opposition.

Apr. 7—Filed Notice of Appeal by J. P. Oddo from denial of motion 3/15/48.

Mailed notices to Warden—Det. Hdqtes. N.Y.C. & Marshal.

Apr. 7—Filed Notice of Appeal by Kingdon de

1948

Normand et al. from denial of motion 3/9/48—mailed notices to Warden—Det. Hdqtes. N.Y.C. & U. S. Marshal (S.D. N.Y.)

Apr. 27—Filed affidavit for allowance of records en forma pauperis by Joseph P. Oddo—allowed 4/26/48. Goddard, J.

May 12—Filed order extending time to file record on appeal as to Joseph P. Oddo et al. to May 28, 1948. Hulbert, J.

Apr. 12—Filed notice for motion to C.C.A. to consolidate appeal herein (J. P. Oddo) with printed record that remains among files of Clerk of C.C.A. in U. S. v. K. W. De Normand et al. #256. (Docketed May 25, 1948)

Apr. 12—Filed praecipe for transcript of record (J. P. Oddo) (Docketed May 25, 1948)

May 27—Certified record on appeal delivered to C.C.A. Oddo & De Normand appellants

June 7—Filed copy of order C.C.A. for leave to file record of Kingdon de Normand made up of the original papers & 3 typewritten copies of the brief on or before 8/1/48 & further permitting Marshall Jacobs, Esq., to withdraw as assigned counsel. A. M. Bell, Clerk, C.C.A.

June 7—Filed copy of order C.C.A. denying petition of Kingdon de Normand for Writ of Habeas Corpus. A. M. Bell, Clerk, C.C.A.

Sept. 24—Certified Sup. Record to C.C.A. (Oddo).

1949

Jan. 24—Filed Mandate of C.C.A.—Orders of District Court as to Joseph P. Oddo & Kingdon de Normand are affirmed.

Mar. 1—Filed Notice of Settlement and Order on Mandate—Mandate of C.C.A. filed Jan. 24, 1949, made Judgment of District Court. Clancy, J.

Mar. 1—Filed letter from Kingdon De Normand dated 2/19/49.

Aug. 23—Filed motion of Deft. De Normand to annul, vacate and set aside, unjust, unlawful, unauthorized Trial Court Proceedings, pursuant to the provisions of Sec. 2255 Title 28 U.S.C.A.

United States of America,
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to wit: to elect to enter for sentence in the case of the United States vs. John Mugavero, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September,

in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the One Hundred and Seventy-fourth.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

The United States District Court for the
Southern District of New York

C. 116/211

UNITED STATES OF AMERICA

vs.

JOHN MUGAVERO.

I hereby elect to enter upon service of my sentence of 12 years, in such institution as shall be designated by the Attorney General for such service. It is understood that this election precludes release on bail.

/s/ JOHN MUGAVERO.
(Signature)

Date: August 16th, 1944.

/s/ J. A. COHN,
Record Clerk.
(Witness)

Administrative Form No. 66

November, 1938

(Copy)

Department of Justice

Washington

October 27, 1944

To the Warden, United States Penitentiary, Atlanta,
Georgia:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of John Mugavero, #64394, from the United States Penitentiary, Atlanta, Georgia, to the United States Penitentiary, Alcatraz, California.

Now Therefore you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him

to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,

Director, Bureau of Prisons.

/s/ FRANK LOVELAND,

Assistant Director.

Closer custody.

Original—To be left at institution to which prisoner is transferred.

(A True Copy)

By /s/ C. W. SUNDSTROM,

Record Clerk, USP, Alcatraz,
Calif.

July 26, 1949
Record of Court Commitment
Department of Justice
Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

A True Record:

/s/ C. W. SUNDSTROM,
Record Clerk, Alcatraz.

July 26, 1949.

No. 642-AZ.

Inst. Name: John Mugavero.

Alias: John Mugovero. Color: White. Age: 35
(8-3-13).

True Name: John Mugavero.

Name and number of prior commitments to Fed.
Inst.: 64394-A (instant case).

Offense: Conspiracy and Stealing Interstate Ship-
ment—U.S.C. T. 18, Secs. 409, 88.

District: S—New York, N. Y.—Cr. 116/211.

Judge: Simon H. Rifkind.

Sentence: 12 Years (Counts 1 to 9).

Costs Fine: None.

Sentenced: March 16, 1944.

When arrested: Dec. 1, 1943.

Committed to Fed. Inst.: Aug. 30, 1944—Atlanta.

Where arrested: New York City.

Sentence begins: March 16, 1944.*

Residence: Brooklyn, N. Y.

Eligible for parole: April 28, 1948.

Time in jail before trial: Since arrest.

Eligible for conditional release with good time:
May 19, 1952.*

Rate per mo. good time: 10.

Total good time possible: 1440 days.

Eligible for con. rel. with extra good time: April
25, 1952 (24 days indus. g.t. earned to July 26,
1949).

Forfeited good time:

Amount forfeited:

Restoration good time:

Amount restored:

Expires full term: April 28, 1956.*

Former Commitments on Sentence to Other Institutions

No. 88287, State Prison, Ossining, N. Y.

Action of Board

Date: 3-48. No. app. xxx.

Releases and recommitments on present sentence
other than parole: 11-7-44, trans. to Alcatraz.

Statistics Tabulated

Census Bureau

Bureau of Prisons

Detainer: Wanted for Parole Violation as #23672
—Clinton New York State Div. Parole, Albany,
N. Y. (Warrant on file.)

*Note: 3-20-44 appeal filed; 5-4-44 elected to
serve sentence.

*(Sentence inoperative 44 days while on appeal.)

*Served 5 days prior to filing of appeal.

Exhibit B

to show these two exhibits to the jury.

The Court: You may do that.

(Exhibits handed to the jury by Mr. Hilly.)

The Court: Counsel may inquire.

Mr. Packer: No questions, if your Honor please.

The Court: No cross. You are excused.

(Witness excused.)

Mr. Hilly: Mr. Roche.

MARTIN ROCHE

called as a witness on behalf of the Government,
being duly sworn, testified as follows:

Direct Examination

By Mr. Hilly:

Q. What is your occupation, Mr. Roche?

A. I am a dispatcher.

Q. By whom are you employed?

A. Rapid Motor Lines.

Q. And where is the Rapid Motor Lines located?

A. 229 Tenth Avenue, New York City.

Q. Between what streets is that, Mr. Roche?

A. 23rd Street and 24th.

Q. Pardon me?

A. 23rd Street and 24th on Tenth Avenue.

Q. On what side of the avenue?

A. On the downtown side of the avenue.

The Court: You mean on the west side of the
avenue?

The Witness: On the west side of the avenue.

Q. Has the Rapid Motor Lines any other terminal in New York?

A. No other terminal. That is the only terminal.

Q. I show you this sheet of paper and ask you if you can tell me what that is (handing to witness.)

A. That is a manifest that I made up of the loads on the trucks that left our terminal that day.

Q. Is this paper in your handwriting?

A. In my handwriting.

Q. It is a record kept by your company in the regular course of business?

A. That is right.

Q. How is this record prepared, in duplicate or triplicate?

A. In duplicate form.

Q. Pardon me?

A. In duplicate form.

Q. Is this the duplicate or the original?

A. That is the duplicate.

Mr. Hilly: Will you mark this for identification, please.

(Marked Government's Exhibit 17 for identification.)

Q. Will you tell me, sir, what is the procedure with respect to the original of this manifest?

A. The original of that manifest goes on the truck that leaves our terminal for New Haven.

Q. And the duplicate?

A. And the duplicate is kept in the office in New York City.

Q. When is this manifest prepared, Mr. Roche?

A. At what time?

Q. Yes.

A. That was prepared at 5 o'clock on that respective date.

Q. And what date was that, sir (handing to witness)? A. November 30, 1943.

Q. Is it prepared before or after the trucks leave your terminal? A. Before.

The Court: Were these prepared before these particular trucks left the terminal?

The Witness: Yes, sir.

Mr. Hilly: If your Honor pleases, at this point the Government would like to offer in evidence Government's Exhibit 17 marked for identification.

Mr. Packer: If your Honor pleases, on behalf of all the defendants I object to the introduction of Government's Exhibit 17 for identification on the ground that the offered exhibit is incompetent, irrelevant, no proper foundation has been laid for the introduction thereof, and on the further ground that the said exhibit is hearsay.

The Court: I will examine it.

(Exhibit handed to the Court by Mr. Hilly.)

The Court: Mr. Witness, what are the figures supposed to represent?

The Witness: Those figures are the amount of cases that were on the truck.

The Court: I see. When you say "50" you mean 50 cases?

The Witness: 50 cases, yes, sir.

The Court: And the first column represents the name of the shipper?

The Witness: That is right.

The Court: The second column represents the name of the consignee?

The Witness: Right.

The Court: And the last column represents the quantity of cases?

The Witness: That is right.

The Court: Mr. Hilly, do these names and amounts tie in with the other exhibits?

Mr. Hilly: If your Honor will permit me to proceed with the examination, I will withdraw the offer for the moment.

The Court: I don't keep in mind the figures with respect to the other exhibits. I do not know whether this is the same or at least whether there is a circumstance from which an inference is possible that it is the same one.

Mr. Hilly: I will proceed further and withdraw the offer at this time.

The Court: If you wish.

Mr. Hilly: Yes.

The Court: If you tell me that——

Mr. Hilly: I will tell you that they do represent the same.

The Court: The same names and the same quantity?

Mr. Hilly: Yes, your Honor.

The Court: I will allow it. I will overrule the objection.

(Government's Exhibit 17 for identification received in evidence.)

Q. Mr. Roche, from what is Government's Exhibit 17 in evidence prepared (handing to witness)?

A. From the original bills of lading that were received from the consignor.

Q. I show you Government's Exhibit 7 in evidence, Government's Exhibit 9 in evidence, Government's Exhibit 12 in evidence, Government's Exhibit 14 in evidence, and Government's Exhibit 16 in evidence, and ask you are those the invoices from which you prepared Government's Exhibit 17 in evidence (handing to witness)?

A. That is the exact ones.

Q. And from whom did you receive Government's Exhibits 7, 9, 12, 14 and 16 in evidence?

A. From the consignors, from their shipping departments.

Q. What was the procedure with respect to these five exhibits?

A. Our truck went there and picked up that stuff, checked it on the truck, so that everything was all right and then received these shipping orders from the shipping department or the shipping clerk. Our driver signed for them and brought the original copies back to us.

Mr. Reiss: I move to strike all that out, if the Court please. The best proof is to bring the truckman.

The Court: Yes. The motion will be granted. The jury will disregard the last answer.

Q. (By The Court): You started to tell us what you looked at when you prepared the manifest, Exhibit 17. What papers and what articles, if any?

A. The papers that were shown to me here, which were the shipping orders.

Q. Exhibits 7, 9, 12, 14 and 16? A. Yes.

Q. Did you look at any merchandise?

A. Yes, the merchandise too.

Q. To see whether the merchandise represented on those papers was the same?

A. That is right.

Q. When you wrote down that you were putting 50 cases of a certain brand of whiskey on the truck you made sure there were 50 cases of such whiskey on that truck? A. That is right.

Q. And then you prepared your manifest?

A. That is right.

Q. That was your duty? A. Yes, sir.

Q. In the regular course of your occupation?

A. That is right, sir.

The Court: All right.

Q. (By Mr. Hilly): As a matter of fact, Mr. Roche, with respect to Exhibit 14 in evidence what did you do (handing to witness)?

A. The Park & Tilford's?

Q. Yes.

A. I went to Park & Tilford myself with the driver and helped him load this truck. I signed for the load myself.

Q. You personally checked it onto the truck?

A. Personally checked it onto the truck.

The Court: That is not the truck that goes to New Haven; that takes it to your terminal, is that right?

The Witness: That takes it to our terminal and I there put seals on it, locked it up, and the night

driver comes and takes that same truck to New Haven.

The Court: I see.

Q. With respect to the merchandise as represented by Government's Exhibit 14 in evidence, after it was taken to the terminal what was the procedure?

A. The manifest was made up, I put seals on the truck, sealed both doors and put the Babaco System alarm on it.

Q. Did all of the merchandise as represented by Government's Exhibit 14 in evidence—was that placed on one truck?

A. That was placed on—part on one truck and part on another truck.

Q. And what were the numbers of the trucks on which it was placed?

A. Well, there is 415 of that placed on box No. 4.

Q. By "box No. 4" you have reference to a truck?

A. That is right; that is the trailer box—the number of the trailer.

Q. Yes?

A. And on No. 3 there were 590 put on that one.
The Court: 590 what?

The Witness: 590 cases of whiskey.

The Court: Truck No. 4 and truck No. 3, is that what you told us?

The Witness: That is right.

Q. With respect to the merchandise as represented by Government's Exhibit 7 in evidence, what

was the number of the truck or trucks on which that merchandise was placed?

A. That merchandise was placed on truck No. 4.

Q. And with respect to the merchandise as represented by Government's Exhibit 9 in evidence on what truck or trucks was that merchandise placed?

A. That was placed on box No. 4.

Q. And with respect to the merchandise represented by Government's Exhibit 12 in evidence what truck or trucks was that merchandise placed on (handing to witness)?

A. That was placed on box No. 4.

Q. And with respect to the merchandise as represented by Government's Exhibit 16 in evidence on what truck or trucks was that placed (handing to witness)?

A. That was placed on box No. 3.

Q. In other words, then, in the course of your duties as dispatcher——

The Court: You left out No. 14.

Mr. Hilly: I am sorry, sir.

Q. With respect to Government's Exhibit 14 in evidence what truck or trucks was that merchandise placed on?

A. There were 590 cases of that put on box No. 3 and 415 cases put on box No. 4.

Q. Then after the trucks have been loaded what is the next step that is taken, Mr. Roche?

A. They are brought into the terminal.

Q. Yes.

A. The manifest is made up; I place seals on the doors.

The Court: Don't tell us what you normally do. What did you do on this particular occasion?

The Witness: That is what I did on that particular occasion.

The Court: You put seals on the doors of the truck?

The Witness: Yes, on only one box, on box No. 4.

The Court: You put seals on box No. 4?

The Witness: Yes, sir.

Q. Did you put seals on box No. 3?

A. No, there were no seals put on box No. 3. There cannot be put any seals on that because it has no doors on the back.

The Court: What is it, an open truck?

The Witness: It is a canvas top with a canvas back.

Q. The sides of it are——

A. The sides of it are corrugated.

Q. And the canvas is on top?

A. And the canvas is on top and back.

The Court: Then you told us something about an alarm system.

The Witness: Babaco Alarm System is turned on box No. 4.

Q. What do you then do with respect to Government's Exhibits 7, 9, 12, 14 and 16 in evidence and the original copy of Government's Exhibit 17 in evidence (handing to witness)?

A. They are wrapped all together with a band on them and put on the seat on one of the trucks. That night it was put on box No. 4.

Q. What time do you leave the terminal?

A. Anywhere between 5 and 8.

The Court: What about November 30th? That is the time we are talking about. What time did you leave that night?

The Witness: November 30th, it was about 5:30.

The Court: P.M.?

The Witness: P.M.

Q. Are you the last person to leave the terminal?

A. I am the last person.

Q. What did you do when you left the terminal?

A. I pull the big door down in the front, put the burglar alarm system on and then go out by the small door and lock that one.

Q. Now with respect to box No. 3 and box No. 4, if you know, what was to be the disposition of those two boxes on November 30th?

A. Those two boxes were (End Roche-Direct)

United States of America
Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 60 to 70, inclusive, contain true and complete copies of originals thereof on file in said Court, in the case of United States of America, Plaintiff-Appellee, against Kingdon William DeNormand, etc., Joseph Peter Oddo, etc., Joseph Alfred La Cascia, William Joseph King, etc., and John Mugavero, Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of February, in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

[Seal] /s/ ALEXANDER M. BELL,
Clerk.

[Endorsed]: Filed May 15, 1950.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner" on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment, duly and regularly issued in criminal cause numbered C. 116/211 by the District

Court of the United States for the Southern District of New York on the 16th day of March, 1944, and transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That heretofore petitioner filed an application for a writ of habeas corpus before this Honorable Court in case No. 29017-E, and in this case the petitioner's application was denied although after the order denying the application was entered, a supplemental order was entered which deemed the application as being denied without prejudice;

III.

That in denying the petition for writ of habeas corpus in the aforesaid case No. 29017-E, United States District Judge Herbert W. Erskine entered the following order:

“In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in *Kerr v. Squier*, 151 F. (2d) 308, and *Johnston v. Logamarsino*, 88 F. (2d) 86. In his return to the order to show cause, the respondent

advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The decisions on this point, both in the Supreme Court and in the 9th Circuit are not in harmony.

See:

Ex parte Nielsen, 131 U. S. 176;

Ex parte Bigelow, 113 U. S. 328;

Kerr v. Squier, *supra*; and

Johnston v. Lagomarsino, *supra*.

All these cases allow the issue to be raised by habeas corpus petition.

In re Snow, 120 U. S. 274;

Kastel v. U. S., 30 F. (2d) 687;

Crapo v. Johnston, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

Remaley v. Swope, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to

the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen, 131 U. S. 176, 183;

Kerr v. Squier, 151 F. (2d) 308;

McKee v. Johnston, 109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949."

IV.

That the entire record of the proceedings in the above-mentioned case numbered 29017-E heretofore instituted by this petitioner is hereby referred to and incorporated herein as though set forth in full;

V.

That in his application for writ of habeas corpus on file herein, the petitioner seeks to avoid the legal principle which limits the function of the writ of habeas corpus to the traditional matters of jurisdiction, constitutional rights of a defendant, and the

legality of sentence, as set forth, among others, in the cases of

Sunal v. Large, 332 U. S. 174;

U. S. ex rel Kulich v. Kennedy,
157 F. (2d) 811;

Knewel v. Egan, 268 U. S. 442;

Goto, et al. v. Lane, 265 U. S. 393.

Wherefore, respondent prays that the petition for writ of habeas corpus herein be denied, and the order to show cause heretofore issued, discharged.

Dated: June 16, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

(Here follows Respondents' Memorandum of
Points and Authorities.)

United States of America,
Southern District of New York—ss.

I, William V. Connell, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate to wit: the indictment in the case of the United States vs. Kingdon William De-Normand, have been compared with their originals on file and remaining of record in this office; that

they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 30th day of September, in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the United States the One Hundred and seventy-fourth.

[Seal] /s/ WILLIAM V. CONNELL,
 Clerk.

In the District Court of the United States for the
Southern District of New York

C 116-211

THE UNITED STATES OF AMERICA,

vs.

KINGDON WILLIAM De NORMAND, Alias
Willie Desmond, Alias Robert L. Long, JO-
SEPH ALFRED LaCASCIA, WILLIAM
JOSEPH KING, alias "Kingy" and JOHN
MUGAVERO,

Defendants.

INDICTMENT

Theft of merchandise moving in Interstate Commerce and conspiracy so to do. (Title 18, Sections 409 and 88, United States Code).

Southern District of New York, ss: The Grand

Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc, of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part and which constituted an interstate shipment of freight from Park & Tilford Import Corporation, 543 West 43rd Street, New York City, to Park & Tilford Import Corporation, 171 Brewery Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 1,005 cartons of Park & Tilford liquors and 18 bundles of advertising display matter, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made

and provided (Title 18, Section 409, United States Code).

Second Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Gordon O'Neill Company, 120 Sherman Avenue, Jersey City, New Jersey, to the Liquor Exchange, Inc., 506 Water Street, Bridgeport, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 200 cases of Baltimore Club Rye Whiskey, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East Side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Tiara Products Company, Inc., 95 Van Dam Street, New York City, to the Bacon Bottling Company, 37 Morris Street, Hartford, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 200 cases of Sweet Vermouth Wine, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Fourth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from Giani Company, Inc., 100 Hudson Street, New York City, to the Bacon Bottling Company, 37 Morris Street, Hartford, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 100 cases of Sherry and Muscatel wine, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code.)

Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New

York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Armando Mauro, 768 Grant Avenue, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 50 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Des-

mond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Alfredo Ameidola, 98 Wooster Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 10 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L Long, Joseph Peter Oddo, alias Anthony J Donato, Joseph Alfred LaCascia,

William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to America V. Baccelli, 172 Davenport Avenue, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 5 cases of tomato puree, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of December, 1943, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wil-

fully and knowingly did steal, take and carry away from a certain trailer truck of the Rapid Motor Lines, Inc., of New Haven, Connecticut, parked on the East side of 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels which were then and there a part of and which constituted an interstate shipment of freight from the Trieste Importing Company, 105 Hudson Street, New York City, to Salvatore Balsoon, 24 Jones Street, New Haven, Connecticut, with intent to convert said goods and chattels to their own use, said goods and chattels consisting of 2 cases of Marsalla Tonic, a more exact description being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 409, United States Code).

Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on or about the 1st day of November, 1943, and thereafter up to and including the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, the defendants herein, unlawfully, wilfully and knowingly conspired, combined, con-

federated and agreed together and with divers other persons whose names are to the Grand Jurors unknown, to commit divers offenses against the United States, that is to say, to violate Section 409, Title 18, United States Code, in the manner and by the means hereinafter described.

It was part of said conspiracy that at the time and place aforesaid, the said defendants would unlawfully, wilfully and knowingly and with intent to convert the same to their own use, steal, take and carry away, from certain trucks of the Rapid Motor Lines, Inc., of New Haven, Connecticut, when parked on 10th Avenue near 24th Street, City, State and Southern District of New York, certain goods and chattels moving as and part of and constituting interstate shipments of freight.

Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, and John Mugavero had a conversation with one Edward Wagner at a bar and grill in the vicinity of 31st Street and 3rd Avenue, New York City.

2. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this

Court, on or about the 12th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, met one Edward Wagner at the Holland Diner, southeast corner of Spring and Hudson Streets, New York City.

3. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 26th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, had a conversation in a Plymouth car, License No. NY1C5712, parked in front of the Holland Diner, located at the southeast corner of Spring and Hudson Streets, New York City.

4. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 29th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, met at the northeast corner of 17th Street and 8th Avenue, New York City.

5. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 29th day of November, 1943,

the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, were present near the intersection of Christopher and Greenwich Streets, New York City, and had a conversation with unknown men in a Plymouth car, bearing License No. NY3C5012.

6. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 30th day of November, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, were present at the intersection of Christopher and Greenwich Streets, New York City.

7. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 30th day of November, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero, were present at a diner located on the northeast corner of 22nd Street and 10th Avenue, New York City.

8. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this

Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long and Joseph Peter Oddo, alias Anthony J. Donato, had in their possession loaded revolvers.

9. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, William Joseph King, alias "Kingy," Joseph Peter Oddo, alias Anthony J. Donato, and Joseph Alfred LaCascia, with drawn revolvers, approached one Pasquale Nicholas Cimino and John Thomas Fiak.

10. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, William Joseph King, alias "Kingy," Joseph Peter Oddo, alias Anthony J. Donato, and Joseph Alfred LaCascia forced Pasquale Nicholas Cimino and John Thomas Fiak into the garage of the Rapid Motor Lines, Inc., located at 229 Tenth Avenue, New York City.

11. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943,

the defendant John Mugavero entered the garage of the Rapid Motor Lines, Inc., located at 229 Tenth Avenue, New York City.

12. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, put a loaded revolver to the back of Pasquale Nicholas Cimino.

13. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kingy" bound and gagged one Pasquale Nicholas Cimino.

14. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kingy" bound and gagged one John Thomas Fiak.

15. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant William Joseph King, alias "Kingy" said to one John Thomas Fiak that they were not in that business for the fun of it.

16. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero placed one John Thomas Fiak in a truck parked in the garage of the Rapid Motor Lines, Inc.

17. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, Joseph Peter Oddo, alias Anthony J. Donato, Joseph Alfred LaCascia, William Joseph King, alias "Kingy" and John Mugavero placed one Pasquale Nicholas Cimino in a truck parked in the garage of the Rapid Motor Lines, Inc.

18. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants William Joseph King, alias "Kingy" and Joseph Alfred LaCascia were seated in a Plymouth car bearing License plate 3C5012.

19. In further pursuance of said conspiracy and

to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendants William Joseph King, alias "Kingy" and Joseph Alfred LaCascia each had in his possession a loaded revolver.

20. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant John Mugavero had in his possession an empty metal adhesive plaster roll.

21. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Joseph Peter Oddo, alias Anthony J. Donato, had in his possession an empty metal adhesive plaster roll.

22. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 1st day of December, 1943, the defendant Kingdon William DeNormand, alias Willie Desmond, alias Robert L. Long, had in his possession a forged F.B.I. credential.

Against the peace of the United States and their dignity and contrary to the form of the statute of

the United States in such case made and provided (Title 18, Section 88, United States Code).

/s/ JAMES B. M. McNALLY,
United States Attorney.

A true bill.

/s/ [Indistinguishable]
Foreman.

Filed Jan. 12, 1944. U. S. District Court, S. D. of N. Y.

1944

Jan. 14—All five defendants plead Not Guilty. Bail \$20,000 as to each. Remanded. Jacob M. Offenbender assigned as counsel. Defts. LaCascia and King. Henry W. Goodard, D. J.

Jan. 31—Henry K. Chapman, Esq. assigned to deft. Kingdon W. DeNormand, Leibell, D. J.
Before: Simon H. Rifkind, D. J.

Feb. 29—Trial Begun.

Mar. 1—Trial Continued.

Mar. 2—Trial Continued.

Mar. 3—Trial Continued.

Mar. 6—Trial Continued.

Mar. 7—Trial Continued. Govt. Rests.

Defts. DeNormand and Mugavero move to dismiss each of counts 1 to 9 incl.—Denied
Exc.

Defts. Oddo, King & La Cascia move for dismissal of the Indictment—Denied—
Exc.

Mar. 8—Trial Continued.

Mar. 9—Trial Continued and Concluded (All defts. renew motions for the dismissal of the Indictment and for the direction of a verdict in their favor. Denied—Exc.)

Verdict: All Defendants Guilty as charged. 3/16/44—for sentence: Defendants remanded. (D.) E.T.D.

Mar. 16—Motions as to all defendants.

Motion to set aside verdict. Denied. Exception. (D.)

Motion in arrest of judgment. Denied. Exception.

Mar. 16—All defts. sentenced. See Judgments filed. Rifkind, J.

[Endorsed]: Filed June 16, 1950.

United States District Court for the Northern Dis-
trict of California, Southern Division

No. 29753

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,
District Judge.

E. B. SWOPE, WARDEN, U. S. PENITEN-
TIARY, ALCATRAZ, CALIFORNIA,
Respondent and Appellant,

vs.

JOHN MUGAVERO,

Appellee.

ORDER THAT CASE BE PLACED ON CALEN-
DAR FOR JULY 10, 1950, FOR HEARING
OF MOTION TO STRIKE. ORDER OF SUB-
MISSION VACATED

On motion of Joseph Karesh, Esq., Assistant United States Attorney, ordered submission set aside and case placed on calendar for July 10, 1950, for hearing on motion to strike.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the Respondent, E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, and moves to strike from the petition for writ of habeas corpus herein certain immaterial and redundant matter identified below.

I.

Paragraphs VII, VIII, IX, and X of said petition for writ of habeas corpus, and more particularly petitioner's Exhibit B referred to in paragraph X hereinabove mentioned, comprise evidentiary and immaterial matters. For these reasons, the foregoing paragraphs and exhibit should be stricken from the said petition.

II.

That portion of paragraph XI of said petition at page 4, line 31, beginning with the words "That is," and continuing through the words "Truck 3," at line 2 of page 5, together with the following words at lines 4 and 5 of page 5 "they covered the other merchandise on Truck 4," for the reason that the foregoing allegations comprise immaterial matter and are evidentiary in character, and thus should be stricken from the said petition.

III.

That portion of paragraph XIV of said petition at page 5, line 28, beginning with the words "that if petitioner" and continuing through the words "not

otherwise;”, at line 31 of page 5, for the reason that the foregoing allegation comprises immaterial material and is evidentiary and argumentative in character, and thus should be stricken from the said petition.

Dated: July 13, 1950.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

The petitioner raises the allegation of double jeopardy. If there has been such jeopardy, it must appear upon the face of the record. Petitioner in his application for writ of habeas corpus seeks to circumvent this rule by incorporating in the said application certain evidentiary, immaterial and redundant matter. It is this matter which is the subject of respondent's motion to strike. As authority for such motion to strike, respondent relies on his memorandum here-

tofore filed with his return to order to show cause.

Dated: July 13, 1950.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States
Attorney.

[Endorsed]: Filed July 13, 1950.

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that the motion to strike filed herein by Respondent shall be deemed to have been filed contemporaneously with the return to order to show cause heretofore filed herein by the said Respondent.

Dated July 13th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed July 13, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 29753

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary,
Alcatraz, California,

Respondent.

ORDER GRANTING WRIT

The writ of habeas corpus is hereby granted for the reasons set forth in the earlier memorandum opinion filed September 23, 1949, denying respondent's motion to dismiss, and on the additional authority of *Clawans v. Rives*, 104 F. (2d) 240, subsequently brought to the attention of this Court, on the issue of the propriety of habeas corpus to test the claim of double jeopardy. Petitioner will remain in custody, however, pending appeal from this order by respondent.

Dated: July 31st, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed July 31, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that E. B. Swope, Warden, of the United States Penitentiary, Alcatraz, California, respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, made and entered in the above-entitled proceedings on July 31, 1950, granting writ of habeas corpus.

Dated: August 1, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

[Endorsed]: Filed August 1, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the Respondent-Appellant herein may have to and including the 28th day of October, 1950,

to file the record on appeal herein, in the United States Court of Appeals for the Ninth Circuit.

Dated: September 5th, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 5, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 (a)

E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, respondent-appellant herein, hereby designates the complete record and proceedings in the above-entitled cause, together with all exhibits, and the complete record and proceedings in the cause entitled "John Mugavero v. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California," Civil Number 29017-E, together with all exhibits, for inclusion in the record on appeal, the same to include therein the following:

In Case No. 29017-E

- (1) Petition for Writ of Habeas Corpus together with exhibits attached thereto;
- (2) Order to Show Cause;
- (3) Motion to Dismiss Petition for Writ of Habeas Corpus;

(4) Traverse to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus;

(5) Memorandum Opinion of United States District Judge Herbert W. Erskine, filed September 22, 1949;

(6) Order Granting Respondent Time Within Which to File Return and Supporting Memorandum;

(7) Return to Order to Show Cause, together with exhibits attached thereto;

(8) Petitioner's Traverse to Respondent's Supplementary Proceedings;

(9) Order of United States District Judge Herbert W. Erskine Denying Petition for Writ of Habeas Corpus, filed December 9, 1949;

(10) Motion for an Order to Grant a Rehearing, etc.;

(11) Motion for Permission to Supplement Record;

(12) Minute Order Granting Rehearing Herein, entered March 27, 1950;

(13) Order Vacating Order Granting Motion for Rehearing, entered by United States District Judge Herbert W. Erskine, on May 10, 1950.

In Case No. 29753

(1) Petition for Writ of Habeas Corpus, together with all exhibits;

(2) Return to Order to Show Cause, together with all exhibits;

(3) Minute Order of June 26, 1950;

(4) Minute Order of June 27, 1950;

(5) Order of United States District Judge Herbert W. Erskine, with relation to Respondent's Motion to Strike, filed July 13, 1950;

(6) Respondent's Motion to Strike;

(7) Order of United States District Judge Herbert W. Erskine Granting Writ, filed July 31, 1950;

(8) Notice of Appeal;

(9) Order Extending Time to Docket, entered by United States District Judge Louis E. Goodman on September 5, 1950;

(10) This Designation of Contents of Record;

(11) Clerk's Certificate.

Dated: October 16th, 1950.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ JOSEPH KARESH,

Assistant United States Attorney, Attorneys for
Respondent-Appellant, E. B. Swope, Warden,
United States Penitentiary, Alcatraz, Cali-
fornia.

[Endorsed]: Filed October 16, 1950.

In the District Court of the United States, in and for
the Northern District of California, Southern
Division

No. 29017-E

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, WARDEN, U. S. PENITENTI-
ARY, ALCATRAZ, CALIF.,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
AD SUBJICIENDUM

To the Honorable, the District Court, for the
above-said district.

The petition of John Mugavero, petitioner herein,
and to be quoted hereafter as the petitioner, will re-
spectfully show:

I.

That your petitioner is unlawfully restrained of his
liberty by E. B. Swope, Warden of the United States
Penitentiary at Alcatraz Island, California; that the
body of your petitioner, the said E. B. Swope and
the said United States Penitentiary at Alcatraz Is-
land, California, are all, and each of them is, within
and subject to the jurisdiction of this Court.

Jurisdictional Statement

Jurisdiction is conferred on this Court by Article
1, Section 9 of the U. S. Constitution, sections 451 et

seq., 2241 and 394 of Title 28, U.S.C.A. to hear, grant and issue a Writ of habeas corpus ad subjiciendum.

That your petitioner is in custody under or by color of Authority of the United States; that he is in custody for an act done in pursuance of an Act of Congress, And judgment of a Judge of the United States; that he is in custody in violation of the Constitution of the United States; that it is necessary to bring your petitioner into Court under the provisions of a writ of habeas corpus ad subjiciendum and under the provisions of Section 394 of T. 28 U. S. C. A. for which your petitioner wishes to plead and manage his own case as such latter act of Congress provides and grants a Movant; that your petitioner's Co-defendant has filed a petition in the trial court which was ineffective; that the legal portion of your petitioner's sentence, that is to say a seven year sentence, was completed under the provisions of Section 710 of T. 18 U.S.C.A., on or about April 20, 1949; that Article 1 Section 9 of the Constitution, which grants: "the privilege of the Writ of Habeas Corpus shall not be suspended, ***," this is preeminent over Section 2255, of T. 28 U.S.C., and all such sections and clauses therein. U. S. v. Wong Kim, 169 U. S. 649, 655; Ex parte Grossman, 267 U.S. 80, 108; Dimick v. Schiedt 293 U. S. 474, 478.

Statement of Facts

The factual situation is not complicated but necessitate being set out in length in order to show the true cause for the foregoing petition.

On November 30, 1943, petitioner et al., met near

a terminal of the Rapid Motor Lines, Inc., an interstate carrier of freight, for the purpose of putting into execution their previously arranged plan to take two truck loads of liquor. Petitioner was accompanied by a man named Stegman, whom was thought to be a confederate but was working in conjunction with agents of the Federal Bureau of Investigation.

Inside the terminal building were two loaded trucks of whiskey referred to as truck 3 and truck 4. Truck 3 was a canvas top truck without seals; it contained in Part Only the merchandise involved in counts one and two of the indictment.

Truck 4 was a completely closed truck with locked doors and contained the merchandise involved in counts 3 to 8 inclusive plus part of the merchandise involved in count one. Two employees of the Rapid Motor Lines arrived at the terminal and took such forementioned trucks 3 and 4 and parked them on the street and went to a restaurant to eat. Later as these employees started to approach these trucks, 3 and 4, they were held up and forced to enter the terminal, where they were left bound. Petitioner et al., walked from the terminal and were arrested by the federal agents.

However, the federal agent informer had driven away truck 3. (Truck 4 was not Approached, Moved or its Merchandise Molested in any Respect.)

Petitioner was found guilty on all nine counts of the indictment. Each of the first eight counts was based on Sec. 409 of T. 18 U.S.C.A., and charged that the defendants, "Unlawfully, wilfully and knowingly did steal, take and carry away from "Certain

trailer trucks'' of the Rapid Motor Lines goods belonging to various shippers or consignees. The ninth count charged conspiracy to violate section 409.

Petitioner received a sentence of 12 years. A five year sentence being imposed for the offense set out in Count one and two such sentences to be served concurrently. A five-year sentence being imposed for the offenses set out in Counts 3 to 8, inclusive. These latter sentences to be served concurrently but cumulative to the sentences imposed on Counts one and two. Also a sentence of two years was imposed for violating of count 9, the conspiracy count and to be served cumulative to all other sentences.

The essence of this petition is based on this fact:

Count one charged "the theft from certain trailer trucks of an interstate shipment of freight from Park and Tilford Import Corporation, consisting of 1005 cases of whiskey."

At the trial it was proved that 590 of such cases were in one truck, referred to as truck 3 (the truck the Government agency informer moved), and 415 cases in another truck referred to as truck 4.

Note this latter truck (truck 4), was not moved nor its merchandise molested in any respect. However, this has no bearing on this petition.

Each of counts 3 to 8 charged the theft from a "certain trailer truck'' of an interstate shipment of freight from a named consignor to a named consignee.

"The proof showed (and cannot be contested by the Government) that all the merchandise

mentioned in counts 3 to 8, as well as 415 cases of the Park and Tilford whiskey mentioned in count one was in truck 4.”

The petitioner concedes the sentence imposed on count nine is valid and the sentence imposed on counts one and two. Thus, a seven-year sentence.

Law Involved

The original proceedings of petitioner’s trial court was appealed (U. S. v. De Normand et al., 149 F. 2d. 622). However, it was not called to the trial court judge’s attention, nor to the superior court’s attention, that it was necessary to have possession of trucks 3 and 4 both, in order to complete the offense set out in count one. But the court ruled regarding truck 4 that the defendants had constructive possession of such truck which was sufficient. And in order to hold thus it was necessary to rule that: “We believe that the language should be construed as though it read (Sec. 409) ‘whoever shall steal or unlawfully take (or) (adding a word) carry away or conceal***, with intent to convert to his own use.’” (149 F. 2d. 622 at p. 624). Therefore the point herein raised was not called to the forementioned court’s attention.

One of petitioners co-defendants did raise the facts herein set out in the trial court and appealed to the Second Circuit Court of Appeals in Oddo vs. U. S. 171 F. 2d. 854. This Court held thus:

“The question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been

much mooted in the courts and has produced divergent answers.”

To support their opinion they rested their conclusion on the opinion reached in, but, much disapproved case of *U. S. vs. Beerman*, 24 Fed. Cas. 1065. But such court frankly admits there are many cases that take the opposite view. (171 F. 2d. 854 at p. 858.)

Law of This Circuit

The Circuit Court for the Ninth Circuit has reached an opposite view from the Second Circuit. Specifically so in *Johnston vs. Logomarsino*, 88 F. 2d 86; and *Kerr vs. Squire*, 151 F. 2d. 308.

Contention

That it is the contention of your petitioner and he alleges that the crime charged against your petitioner in the aforesaid indictment constitutes but a single sentenceable offense; that the trial court, after entering the sentence of five years on count 1 of said indictment, exhausted its power and authority to impose a sentence on the other counts of said indictment and that said sentences so imposed on said counts are null and void; (Count nine excepted) that your petitioner has fully and completely served this sentence on said first and ninth count, and the continued detention and imprisonment of your petitioner subjects him to more than one punishment in the Federal courts for the same crime.

Prayer

Wherefore, to be relieved of said unlawful deten-

tion, restraint and imprisonment, as aforesaid, your petitioner prays that this petition for a Writ of Habeas Corpus ad Subjiciendum be granted, heard and issued and that this Court make its order directing the aforesaid E. B. Swope, Warden, respondent herein, to appear before this Honorable Court, with the body of your movant, at a time and place to be set forth, to show cause, if any he has, why the foregoing petition should not be granted and a Writ of Habeas Corpus ad Subjiciendum should not be issued and your petitioner not be discharged as prayed.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in Propria Persona, Alcatraz Island,
California.

United States of America,
State of California,
County of San Francisco—ss.

John Mugavero, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows its contents; that the same is true of his own knowledge except as to those matters which are herein stated upon his information or belief and as to those matters he believes it to be true.

/s/ JOHN MUGAVERO,
Petitioner.

Subscribed and sworn to before me this 28th day of June, 1949.

[Seal] N. F. STUCKER,
Act. Associate Warden of U. S. Penitentiary, Alcatraz Island, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 1st day of August, 1949, at the hour of 10 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: July 21st, 1949.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed July 21, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR WRIT
OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Petition for Writ of Habeas Corpus on the following grounds:

1. Said Petition fails to show that petitioner has filed a motion in the trial Court to vacate, set aside, or correct the sentence heretofore imposed against him as required by Title 28 U.S.C.A., Section 2255.

2. Said Petition fails to state a cause of action upon which relief can be granted.

Dated: August 8, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States
Attorney,
Attorneys for Respondent.

(Attached are Memorandum of Points and Authorities).

[Endorsed]: Filed August 8, 1949.

[Title of District Court and Cause.]

TRAVERSE TO RESPONDENT'S MOTION TO
DISMISS PETITION FOR WRIT OF HA-
BEAS CORPUS AD SUBJICIENDUM

Comes now the petitioner John Mugavero, and will respectfully show this Honorable Court the petition for writ of habeas corpus ad sujiciendum should be granted and issued as heretofore prayed.

I.

First, it should be noted petitioner invoked the privilege granted by Section 394 of T. 28 U.S.C. now Section 1654 of T. 28 U.S.C.A., which plainly states:

“In all courts of the United States the parties may plead and conduct their cases personally***.” (Sec. 1654, T. 28).

This Section is referred to in petitioner's Jurisdictional statement and petitioner wishes to invoke the power granted him therein. Thus, to be present and conduct his own case.

II.

The learned counsel for the Respondent quotes Section 2255 of T. 28 U.S.C., (P. 2) and states such section has not been complied with.

This position is untenable and his arguments bonded on this contention are unsound and void of merit for two reasons, among others.

First, the pertinent part of this section to the present case reads:

“***Unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

Petitioner stated in his jurisdictional statement that his co-defendant (imprisoned herein, Alcatraz) had filed a petition in the trial court, predicated on the contention herein which was ineffective. (*Oddo vs. U. S.*, 171 F. 2d. 854).

From this decision (*Oddo vs. U. S. supra*), it shows beyond question “that the remedy by motion is inadequate and ineffective,” as to your petitioner.

Second: Since waiting the decision of his co-defendant, your petitioner has satisfied the legal portion of his sentence under the opinion of the Ninth Circuit Court. (*Johnston vs. Logomarsino*, 88 F. 2d. 86).

If petitioner applied to the trial court for an opinion on the point raised herein, such court would rule *res judicata* under the *Oddo vs. U. S.* case *supra*, irrespective of the opinions reached by the Ninth Circuit Court of Appeals in several recent cases.

Thus, it is manifest such section cannot be made to apply to the present case.

III.

Respondent States at P. 1

“Said petition fails to state a cause of action upon which relief can be granted.”

Regarding a Cause of Action

If the legal portion of a judgment has been served and further imprisonment on such judgment is a violation and infringement on the United States Constitution, and it is so shown by decisions of the Ninth Circuit Court that the legal portion of such sentence has been served, this should be ample to show cause of action.

IV.

Respondent quotes *U. S. vs. De Normand et al.*, 149 F. 2d. 622 (p. 2) and states "the contention of petitioner was decided adversely to him on appeal from his judgment of conviction."

Again Respondent's attorney inadvertently overlooked the fact that the contention raised in the petition for habeas corpus was not before the court in the *De Normand* case *supra*. This is shown in a short perusal of the *Oddo vs. U. S.* case *supra*.

Further in Respondent's brief we find at p. 2:

"***That there is no merit to this contention goes without saying***."

(This pertains to what was before the appellate court on the original appeal.)

If the court should adopt this as their opinion, then they are being misled by the counsel for the Respondent. (See *Oddo vs. U. S.* *supra*), and in addition it would be theoretically adopting an opinion that is in conflict with the Ninth Circuit Court's rulings in *Johnston vs. Lagomarsino* 88 F. 2d. 86; *Dimenza vs. Johnston* 130 F. 2d. 465. And *Kerr vs. Squire* 151 F. 2d. 308.

We will go further and show there is merit in the contention raised by the habeas corpus petition by quoting a small part of Second Circuit Courts opinion in Oddo vs. U. S. case supra.

P. 856: "The question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the Courts and has produced divergent answers."

This question was decided favorably to petitioner's in the Logomarsino case supra, among others.

The Second Circuit Court says very frankly that: "Probably at least as many cases can be found which take the opposite view" (p. 857).

Inasmuch as the Ninth Circuit Court has taken the opposite view to the Second Circuit, shows there is merit in petitioner's contention and certainly shows a cause of action.

Wherefore your petitioner prays that the petition for writ of habeas corpus ad subjiciendum be granted and this Honorable Court enter its order to the Respondent herein to have your petitioner present so he may personally conduct his own case and that such petition be issued and petitioner discharged as prayed.

Dated this 17th day of August, 1949.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner In Propria

Persona.

United States of America,
County of San Francisco,
State of California—ss.

John Mugavero, being duly sworn, deposes and says: That he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

/s/ JOHN MUGAVERO,
Petitioner.

Sworn to before me this 17th day of August, 1949.

[Seal] /s/ P. MADIGAN,
Associate Warden,
U. S. Penitentiary,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]: Filed August 18, 1949.

In the United States District Court of the Northern
District of California, Southern Division

No. 29017-E

JOHN MUGAVERO,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitenti-
ary, Alcatraz, California,

Respondent.

JOHN MUGAVERO,

In propria persona.

FRANK J. HENNESSY,

United States Attorney.

JOSEPH KARESH,

Assistant United States Attorney,

Postoffice Building,

San Francisco 1, California,

Attorneys for respondent.

Erskine, District Judge.

MEMORANDUM OPINION

This is a petition for a writ of habeas corpus. An order to show cause was issued, whereupon respondent replied with a motion to dismiss the petition on the following grounds:—

1. That petitioner has not filed a motion in the

trial court to vacate the sentence imposed as per 28 USCA 2255;

2. That the petition fails to state a cause of action upon which relief can be granted.

(1) Necessity for Motion to Trial Court.

Section 2255 of Title 28 does require such motion to the trial court before a habeas corpus petition will be heard, with the following exception, which is the last clause of section 2255: “. . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.” Therefore the question is whether such remedy would be adequate or effective in the instant case.

Petitioner alleges correctly that his co-defendant filed such a petition in the trial court predicated upon the same grounds advanced herein by petitioner. This motion was denied by the trial court, upheld by the Circuit Court of the 2nd Circuit in the case of *Oddo v. United States*, 171 F. (2d) 854, a decision which, as will be pointed out below, seems contrary to the decisions of the 9th Circuit on the point. Thus, it seems logical to conclude that a motion by petitioner to the trial court would be ineffective.

The applicability of this last clause of Section 2255 has apparently risen in only two cases. In *St. Clair v. Hiatt*, 83 F. Supp. 585, petitioner had not complied with the requirement of motion to the trial court prior to bringing of the writ of habeas corpus. However, prior to the effective date of the statute, the petitioner had carried on correspondence with

the trial judge, which the latter declared he would treat as a motion to correct the sentences. No appeal was taken from the decision of the trial judge not to correct said sentences. Nevertheless the Court hearing the habeas corpus petition held that there was sufficient compliance with Section 2255.

The most analogous case to the present one is *Stidham v. Swope*, 82 F. Supp. 931, in which Judge Denman of the Ninth Circuit Court of Appeals granted the petition for the writ despite the failure of the petitioner to move the trial court to vacate the sentence, holding that such a motion was inadequate and ineffective to test the legality of petitioner's detention. He based this holding on the fact that the petitioner in Alcatraz was 1500 miles from the sentencing court, with the attendant expense, time and trouble involved in the motion and the consequent appeal, whether or not the petitioner was personally removed back to the locale of the sentencing court, and on the fact that the case could be much more summarily disposed of in San Francisco, since the Warden at Alcatraz was easily available. Judge Denman was undoubtedly influenced by the fact the petitioner in that case apparently had valid grounds for asking for release. With that factor in mind it is probably correct to state that the question of whether a motion to the sentencing court would be effective or not depends to a large extent upon our conclusions as to the substantive merits of the petitioner's case.

(2) Substantive Basis for Petition.

Unfortunately, in his petition for dismissal, re-

spondent has chosen to rest his case primarily on the issue of the necessity of motion to the sentencing court, and discusses the substantive issue only to the point of citing *United States v. de Normand*, 149 F. (2d) 622, which was the original appeal by petitioner from his judgment of conviction. This, however, does not meet the main objection of petitioner, which is that the decisions of the 9th Circuit are contrary to those of the 2nd Circuit, which decided the *de Normand* case, and also the case of *Oddo v. United States*, 171 F. (2d) 854, brought by petitioner's co-defendants, where the exact point under consideration here was decided adversely to the petitioner.

The facts underlying this petition are somewhat as follows.

Petitioner was indicted and convicted on nine separate counts. Count 1 charged the theft from "certain trailer trucks" of an interstate shipment of freight consisting of 1005 cases of whiskey. At the trial it was proven that 590 of such cases were in one truck, called truck #3, and 415 in another truck, called truck #4. Counts 3 to 8 charged the theft from "a certain trailer truck" of an interstate shipment of freight consisting of numerous cases of wine, tomato juice, and so forth. The proof showed that all of the merchandise in counts 3 to 8 were in truck #4. Count 9 charged a violation of the conspiracy statute. Petitioner was convicted on all counts, and was sentenced to 5 years for count 1 and 5 years for counts 3 to 8, and 2 years for count 9, to run consecutively. It might be here noted that truck

#4 was a completely closed truck with locked doors.

Petitioner argues here, as did the petitioner in the identical case of *Oddo v. United States*, *supra*, that since count 1 covered the goods in truck #3 plus some of the goods in truck #4, and since, therefore, possession actual or constructive of truck #4 was necessary in order to convict under count #1, as found in *United States v. de Normand*, *supra*, there was no additional criminal act for which he could be convicted, and that the imposition of the additional five years under counts 3 to 8 was a second sentence for the same offense. In substance, the contention is that a thief who steals a vehicle and its contents commits but one theft, even though the vehicle contains packages of different kinds of goods belonging to different owners.

As the Court pointed out in *Oddo v. United States*, *supra*, the question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers. That court, the 2nd Circuit, could discover no controlling Supreme Court authority, and decided that counts 3 to 8 charged offenses separate from the crime charged in count 1. The reasoning of that court is based primarily upon the following quoted paragraph:—

“The test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count. (Citing cases) Proof that the appellant

feloniously took possession of the 415 cases of whiskey belonging to Park & Tilford Corporation in truck #4 and involved in count 1 would not have proved that he feloniously took possession of the different merchandise of different ownership specified in counts 3 to 8." (171 F.(2d) 854 at 857)

However, it appears that the court overlooked the important fact that truck #4 was a locked truck and was never moved or tampered with. Therefore, if, as was determined, the petitioner had possession of truck #4 and the 415 cases of whiskey involved in count 1, how could it be held that he did not at the same time and place have felonious possession of the remainder of the merchandise in truck #4? Evidence to support a finding of possession of truck #4 and of the 415 cases, will also prove possession of the rest of the merchandise, enumerated in counts 3 to 8.

Turning from the facts, for a moment, and the logical difficulties in the opinion of the 2nd Circuit, to the cases in the 9th Circuit, it seems that the latter are contrary, at least in theory, to the Oddo case. Thus in *Kerr v. Squier*, 151 F. (2d) 308, it was held that three separate counts, charging theft of three mail bags from a post office, justify but one 5 year sentence, and require discharge on habeas corpus of the defendant who had served a five-year sentence on one of such counts, the trial court having found that the bags were simultaneously taken in one transaction. Again in *Johnston v. Logomarsino*, 88 F. (2d) 86, it was held that a taking of

three letters in a simultaneous and single transaction constitutes a single offense, and the petitioner was ordered released upon the service of the first of three sentences for the taking of the letters.

It is difficult for me to distinguish the present case from the reasoning in those two 9th Circuit cases; it would follow that in the instant case there was not only one transaction, but only one act which could not be divided into separate offenses. Since petitioner has served a period of time equal to the sentence imposed for counts 1 and 9, my opinion is that the respondent's petition to dismiss should be denied, without prejudice to respondent's right to more fully answer the substantive contentions of the petitioner.

Dated: September 22nd, 1949.

/s/ HUBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed September 23, 1949.

[Title of District Court and Cause.]

ORDER GRANTING RESPONDENT TIME
WITHIN WHICH TO FILE A RETURN
TO ORDER TO SHOW CAUSE, AND MEM-
ORANDUM OF POINTS AND AUTHORI-
TIES IN SUPPORT THEREOF

On Motion of Joseph Karesh, Assistant United States Attorney, attorney for the Respondent, and good cause appearing therefor,

It Is Hereby Ordered that the Respondent herein may have to and including October 10, 1949, within which to file the Return to Order to Show Cause and Memorandum of Points and Authorities in Support Thereof.

Dated: September 29, 1949.

/s/ HUBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed September 30, 1949.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment, duly and regularly issued in criminal cause numbered C. 116/211 by the District Court of the United States for the Southern District of New York on the 16th day of March, 1944, and transfer order dated the 27th day of October, 1944, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That attached hereto and made a part hereof as "Exhibit A" are the following:

(1) Certified copy of indictment in said criminal cause numbered C. 116/211 returned against the said petitioner and Kingdon William DeNormand, Joseph Peter Oddo, et al.;

(2) Certified copy of judgment and sentence and warrant of commitment in the case of United States v. John Mugavero, criminal cause numbered C. 116/211;

(3) Certified copy of docket entries in the case of United States v. John Mugavero, Kingdon Wil-

liam DeNormand, Joseph Peter Oddo, et al., criminal cause numbered C. 116/211;

(4) Certified copy of election of petitioner to enter upon service of sentence in said criminal cause numbered C. 116/211;

(5) Copy of transfer order, as aforesaid;

(6) Copy of record of court commitment No. 642-AZ, United States Penitentiary, Alcatraz, California;

III.

That the contentions advanced by the petitioner in his application for writ of habeas corpus on file herein were also in substance urged by him on appeal from his judgment of conviction before the United States Court of Appeals for the Second Circuit, and decided adversely to him, in *United States v. DeNormand, et al.*, 149 Fed (2d) 622, certiorari denied 326 U.S. 756, rehearing denied 326 U.S. 808, rehearing denied 326 U.S. 811, rehearing denied 327 U.S. 816, certiorari denied 330 U.S. 822, rehearing denied 330 U.S. 854; that the aforesaid decision in the United States Court of Appeals for the Second Circuit is hereby referred to and incorporated herein as though set forth in full; that in an opinion involving codefendants of the petitioner herein, in *Oddo v. United States*, and *United States v. DeNormand*, 171 Fed. (2d) 854, 856, the United States Court of Appeals for the Second Circuit, in a footnote, corrected an erroneous statement which it had made in reliance on briefs of counsel in *United*

States v. DeNormand, et al., 149 Fed. (2d) 622 at page 625;

Wherefore, respondent prays that petition for writ of habeas corpus herein be denied, and the order to show cause heretofore issued, discharged.

Dated: October 12th, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States
Attorney,
Attorneys for Respondent.

[Endorsed]: Filed October 12, 1949.

[Title of District Court and Cause.]

PETITIONER'S TRAVERSE TO RESPOND-
ENT'S SUPPLEMENTARY PROCEEDINGS

To the Honorable Court:

Comes now the petitioner John Mugavero and enters this traverse to respondent's Supplementary Proceedings and will show:

I.

That petitioner filed for writ of habeas corpus ad subjiciendum in July, 1949. Show cause issued to be returned on August 1, 1949. Respondent filed a Motion to Dismiss August 8th, 1949. The court rendered a decision on September 22, 1949.

II.

The Court subsequently entered an order grant-

ing the respondent further time, thus to October 10th, 1949, to supplement their Petition to Dismiss.

However respondent failed to file such return until October 12th, two days late.

III.

Respondent has now filled the Court with unnecessary records, that have no bearing on the points involved.

IV.

The contention raised in the petition for habeas corpus was not before the Circuit Court in *United States v. De Normand* 149 F. 2d 622.

V.

That the point raised by petitioner was tacitly and correctly set out by the Court in its "Memorandum Opinion." And such contention adhered to by the Honorable Court, with the Authorities quoted in which the court predicated their opinion and decision.

VI.

That petitioner wishes to incorporate this Honorable Court's Memorandum Opinion as though fully set out herein and to be made a part of this latter proceedings.

Wherefore petitioner prays the petition for writ of habeas corpus ad subjciendum be issued and he be discharged as prayed, without further delay.

Dated: October 18th, 1949.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

[Title of District Court and Cause.]

PETITIONER'S POINTS AND AUTHORITIES IN SUPPORT OF PETITION, IN OPPOSITION TO RESPONDENT'S RETURN

The petitioner herein, seeks by habeas corpus, and shows herein that it is a proper proceeding in which to raise the point here at issue, and further sets out ample authorities in which to predicate his contention on and to support an order to discharge as heretofore prayed.

I.

Respondent first quotes in his return at P. 1, of his brief:

“Remaley v. Swope, 100, F. 2d 31-33.”

The writer herein cannot see the significance of quoting this decision to the case at bar. We will take only one (others would be cumulative) of these cases herein quoted and show what United States Supreme Court holds on a point as raised by petitioner.

Thus, we read in *ex parte Neilsen*, 131 U. S. 176;

“* * * The first question to be considered, therefore, is whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by habeas corpus. The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which

could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule, which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, whether because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void, and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the case of *ex parte Lange*, 18 Wallace, 163 and *ex parte Siebold*, 100 U. S. 371 and in several other cases referred to therein. * * *

The rule above as stated by the United States Supreme Court, has been, in substance, enunciated in this Circuit in the recent cases of *Kerr V. Squier*, 151 F. 2d 308; *Dimenza v. Johnston*, 130 F. 2d 465, and *Johnston v. Logomarsino*, 88 F. 2d 86 among others. Obviously the foregoing shows that a petition for habeas corpus is a proper proceeding in the instant case and further authorities would be cumulative.

II.

At page two (2) of the Respondent's brief the Respondent raised the issue of records and says:

"The law seems to be that in such a collateral proceeding the court can not look outside of the face of the record to determine whether

or not there has been a violation of (this) his constitutional guarantee.”

It would seem that Rule 27 of the Federal Rules of Criminal Procedure for the District Courts of the United States, has been over looked by the Respondent where we find:

Rule 27: Proof of Official Record:

“An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in Civil Actions.”

The Civil Actions rules provides and holds that the records as referred to by petitioner are clearly proper and can be used by this Honorable Court as it has used them. (Rule 44 of C.P.R.)

As was said in *re Nielsen*, *supra*. The Supreme Court says:

“It is true that in the case of *Snow* we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or elsewhere in the record (of which the judgment is only a part), it is sufficient. * * *”

III.

At page 3 of respondent's brief we find:

“Assuming *arguendo*, that this court could properly inquire into the evidence before the trial court as reflected in the opinion of the Appellate Court, respondent nonetheless asserts that the petition for writ of habeas corpus should be denied.”

The petitioner herein understands it to be a rule

of law, that the law or Court is bound by their Appellate Court decisions.

In the Kerr case *supra* the Ninth Circuit Court released the petitioner Kerr on a habeas corpus proceedings which had raised the double jeopardy issue and the same result occurred in the case of *Johnston v. Logomarsino, supra*.

In the case of *Dimenza v. Johnston*, 130 F. 2d 465, the Ninth Circuit held in this case:

Dimenza having a four count indictment. Three of the counts charged as assault on different person. A five-year sentence was imposed on each count to run consecutively.

However, on a habeas corpus proceeding which maintained that three sentences were imposed for one offense, thus an infringement on the double jeopardy clause of the Fifth Amendment, the Circuit Court was in full accord, thereby releasing the defendant after serving the valid portion of one of the Assault Counts.

What additional proof or decisions is it necessary to show the counsel for the respondent that petitioner has raised a proper question and in a proper form fully supported by the Appellate Court.

True, the point at issue was raised at one time before the Second Circuit Court in *Oddo v. U. S.*, 171. F. 2d 854, and such court said in one place of their decision:

“The question whether the stealing of the goods of different owner’s at one time and

place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers.” (P. 856.)

When the Second Circuit Court states this to be a much mooted question. It should be sufficient to cause this court to make inquiries and construe their answer to be in conformity with the Appellate Court decision of this Circuit. The following cases also are in harmony to the Ninth Circuit Court’s rulings:

Chanock v. U. S.,

267 F. 612;

Henry v. U. S.,

263 F. 459;

Braden v. U. S.,

8 Cir., 270 F. 411, among others.

IV.

It is also noted by government’s brief at p. 5, that because it is Section 409 of T. 18, U.S.C., violated a different interpretation should be placed upon this particular section.

Why should this Section (409) be loosely construed to cover many crimes and all other sections strictly construed?

It is a maxim of criminal law that all criminal Statutes shall be strictly construed.

Note

Petitioner might further add, upon release from the U. S. Penitentiary, be that when it may, he still

will have eleven (11) calendar years to serve in the New York State Penitentiary.

Wherefore, it is respectfully submitted, that the sentence imposed on counts three to eight are in excess of the law; that only one offense was committed and a valid sentence was imposed for such offense which has been fully served.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

ORDER

In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in *Kerr v. Squier*, 151 F. (2d) 308, and *Johnston v. Logomarsino*, 88 F. (2d) 86. In his return to the order to show cause, the respondent advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy, which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The

decisions on this point, both in the Supreme Court and in the Ninth Circuit are not in harmony.

See:

Ex parte Nielsen,

131 U. S. 176;

Ex parte Bigelow,

113 U. S. 328;

Kerr v. Squier, *supra*; and

Johnston v. Logomarsino, *supra*.

All these cases allow the issue to be raised by habeas corpus petition.

In *re* Snow, 120 U. S. 274; *Kastel v. U. S.*, 30 F. (2d) 687; *Crapo v. Johnston*, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

Remaley v. Swope, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen,

131 U. S. 176, 183;

Kerr v. Squier,

151 F. (2d) 308;

McKee v. Johnston,

109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

MOTION FOR AN ORDER TO GRANT A RE-
HEARING IN PETITION FOR WRIT OF
HABEAS CORPUS AND TO PERMIT THE
FILING OF SUBSTANTIATING EVI-
DENCE

To The Honorable Judge Erskine:

Comes now the petitioner in Case No. 29017-E, and respectfully moves this Honorable Court for an order granting a Rehearing in petition for Writ of

Habeas Corpus and to permit the filing of a Record to substantiate same.

I.

An order denying the petition for writ of Habeas Corpus was entered on December 9, 1949. The petition for writ of habeas corpus stated petitioner had been convicted and sentenced twice for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner incorporated the opinion of the Circuit Court for the Second Circuit to support the double jeopardy contention.

However, this Court held and ruled such is not sufficient and proper to base a petition for writ of habeas corpus on. For such reason, among others, petitioner prays for a Rehearing.

II.

The Ninth Circuit Court has recently held in their opinions that a defendant that has been subjected to double punishment for a single offense can raise such point in a petition for Writ of Habeas Corpus. *Kerr vs. Squier*, 151 F. (2d.) 308;

Dimenza vs. Johnston, 130 F. (2d.) 465, and *Johnston vs. Logomarsino*, 88 F. (2d.) 86.

Such being the rule and law as stated and held by the Ninth Circuit Court of Appeals, we now come to the crucial point of such petition.

“Can this Court accept the official opinion of the Second Circuit Court of Appeals as part of the official record?”

Inasmuch as a petition for writ of Habeas Corpus is a Civil Action, the Rules of Civil Procedure controls. Thus, Rule 44 of such rules we find:

“(a) Authentication of copy. An official record or an entry therein, when admissable for any purpose, may be evidenced by an official publication thereof***.”

“(c) Other proof. This does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by an applicable statute or by the rules of evidence at common law.”

In addition to the foregoing, petitioner will attack the evidence given verbatim by Mr. Martin Roche the dispatcher for the Rapid Motor Lines, who was responsible for the loading of the trucks involved. And the one who stated that 590 cases of whiskey (that were charged in the first count), was in truck or box 3, and 415 cases of whiskey (that were also charged in the first count), was in truck or box 4.

Also the pertinent parts of the two truck drivers, John Thomas Fiak who was to drive truck or Box No. 4, and Pasquale Nicholas Cimino, who was to drive truck or Box No. 3.

John Thomas Fiak stated that as both he and Cimino got to the truck, where they both were held up.

Also indictment and judgment and commitment.

The attached transcript of evidence was taken from the original trial court record and presented

to the Second Circuit Court on direct appeal. Petitioner will certify in the proper place such is an authentic copy of the evidence presented at petitioner's trial.

III.

To restate in part the Supreme Court's opinion in the case of *ex parte Neilson*, 131 U. S. 176, we find:

“* * * It is true that in the case of *Snow* (120 U. S. 274) we laid emphasis on the fact that double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or elsewhere in the record of which the judgment is only a part it is sufficient.”

The foregoing taken as a whole should be sufficient to sustain the petition for writ of habeas corpus.

In conclusion we call this Honorable Court attention to Supreme Court's opinion regarding a petition that was drafted by one of the prisoners of Alcatraz where we read:

P. 1017 of 61 Sup. Ct. 1015. “* * * A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice.” *Holiday v. Johnston* 313 U. S. 342, 61 Sup. Ct. 1015.

(Prayer)

Wherefore petitioner herein prays this petition for rehearing be granted; that the evidence attached

be fully considered, and that the petition for Writ of Habeas Corpus be issued as prayed for.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner, in propria persona.

Oath of Verification

State of California,

County of San Francisco—ss.

The petitioner herein John Mugavero, being first duly sworn and says: that the foregoing is all the truth as he knows it; that the attached evidence of Mr. Martin Roche, and the partial evidence of Mr. Pasquale Nicholas Cimino and Mr. John Fiak, is a true copy of the trial court minutes as presented in the original appeal to the Circuit Court of Appeals for the Second Circuit; that petitioner sincerely believes he is entitled to the redress as herein prayed for.

/s/ JOHN MUGAVERO,

Petitioner in propria persona.

Subscribed and sworn to before me this 19th day of December, 1949.

[Seal] /s/ P. MADIGAN,

Associate Warden of U. S. Penitentiary, Alcatraz Island, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Mugavero is a citizen of the United States.

[Endorsed]: Filed December 21, 1949.

[Title of District Court and Cause.]

MOTION FOR PERMISSION TO SUPPLEMENT RECORDS TO A MOTION FOR AN ORDER TO GRANT REHEARING IN PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge Erskine:

Comes now the petitioner John Mugavero and respectfully moves this Honorable Court for permission to add to the record in the Motion for re-hearing to Writ of Habeas Corpus.

That attached hereto are the following:

(1) Certified (partial) copy of the testimony of Mr. Martin Roche, Dispatcher for Rapid Motor Lines Co.;

(2) Certified Copy of the first 10 pages of Mr. John Thomas Fiak, driver of truck or Box No. 4. (Sealed Truck.)

I.

Mr. Martin Roche's Testimony will show that 590 cases of whiskey of the 1005 cases as charged in Count 1, were placed in Box No. 3, (Open Truck) and 415 cases placed in Box No. 4 (Sealed Truck).

Dated on the 8th day of February, 1950.

Respectfully submitted,

/s/ JOHN MUGAVERO,

Petitioner, in propria persona.

The Court: Call your next witness.

Mr. Hilly: John Fiak.

JOHN THOMAS FIAK

called as a witness on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hilly:

Q. How old are you, Mr. Fiak? A. 25.

Q. Married? A. Yes.

Q. Have you any children? A. Two.

Q. Have you ever been convicted of any crime?

A. No.

Q. What is your occupation?

A. Interstate truck driver.

Q. And by whom are you employed?

A. Rapid Motor Lines.

Q. What is the route that you drive for the
Rapid Motor Lines?

A. I start out at New Haven every night and
come down to the New York terminal, pick up a
truck in New York and go back to New Haven.

Q. Where is the New York terminal located?

A. On Tenth Avenue between 23rd and 24th.

Q. Would you just keep your voice up a bit, Mr.
Fiak.

On November 30th of 1943, did you leave or did
you drive a truck from the New Haven terminal to
New York? A. Yes.

Q. At about what time did you leave the New
Haven terminal? A. About 8:30.

Q. And about what time did you arrive in New York? A. About 11:30.

Q. What did you do, sir, when you arrived in New York?

A. I parked the truck directly in front of the terminal and I went and opened the doors—shut off the burglar alarm and opened the large door and just as I got in to pull my truck out, the other driver pulled up across the street with his truck from New Haven.

Q. Another driver from New Haven pulled up across the street with his truck.

A. That is right.

Q. What did you do after you had the doors open?

A. I pulled my truck out across the street.

Q. Where did you park it?

A. On the east side of Tenth Avenue, facing north.

Q. I show you Government's Exhibits 18 and 19 in evidence and ask you which one is your truck (handing to witness)? A. This one.

The Court: The closed one or the open one?

Q. The closed truck or the open truck?

A. The closed one.

Mr. Hilly: Referring to Government's Exhibit 18 in evidence.

Q. Now what happened when you pulled out Government's Exhibit 18 in evidence out of the terminal?

A. When I pulled mine out Cimino had just

pulled up across the street and he pulled in his, the truck he brought in from New Haven.

Q. And then what happened?

A. And then he pulled his out that was loaded for New Haven.

Q. I show you Government's Exhibit 19 in evidence and ask you if that is the truck——

A. That is right.

Q. ——that Cimino pulled out (handing to witness)? A. Yes, sir.

Q. Did you see where he drove it to?

A. Well, there wasn't enough room directly across from the terminal so he parked it on Tenth Avenue between 24th and 25th, facing north.

Q. What did you do when Cimino pulled his truck out?

A. Well, when he pulled his out he pulled his back in that he drove in from New Haven, the truck that he had brought in from New Haven.

Q. Yes.

A. (Continuing): And then we closed the large doors, set the burglar alarm and closed the small door.

The Court: The trucks you had brought from New Haven were both empty?

The Witness: No, they were both loaded.

The Court: Both loaded?

The Witness: Yes, sir

Q. And after you had closed the terminal and set the burglar alarm, what did you do?

A. We walked right to the corner in a restaurant and had a cup of coffee.

Q. When you say "we" you mean you and Cimino? A. Yes.

Q. What is the name of the restaurant?

A. Imperial Foods, I think it is.

Q. And how long were you in the restaurant?

A. Oh, about 10 or 15 minutes at the most.

The Court: Where is the restaurant?

The Witness: It is right on the corner of 23rd and Tenth.

Q. What did you do after you had your cup of coffee with Cimino?

A. Then we both walked out together and we started walking over toward my truck, because that was the nearest because the restaurant, and I took the flashlight out of my pocket and shone it on the back doors to see if the seals were all right on it, and then I shone it on the back doors, and just as I did that a couple of fellows came walking over toward me.

Q. Did you have a conversation with these fellows?

A. I didn't have much chance. The leader, one fellow——

Mr. Reiss: I move to strike it out.

The Court: Strike it out.

Did you have any conversation—yes or no?

The Witness: No.

The Court: All right.

Q. Did they say anything to you?

A. They told me to turn around and march towards the garage.

Q. Do you see in court any of the men who ap-

proached you on that occasion? A. Yes, sir.

Q. Where are they?

A. Sitting right over there. (Indicating.)

Q. Pardon me? A. Sitting over there.

Q. Will you stand up and tell us which men sitting over there you saw?

A. Well, I saw the first fellow in the seat there with the eyeglasses.

Mr. Hilly: Will your Honor direct the reporter to indicate on the record that this witness has identified the defendant DeNormand.

The Court: So ordered.

A. (Continuing): And that fellow sitting right next to him.

Mr. Hilly: And also the defendant King.

The Court: It will be so ordered.

A. (Continuing): That's all.

Q. Did you notice anything in their hands?

A. Well, I noticed DeNormand had a gun and King had a gun.

Q. Where was Cimino at this time?

A. Well, he was standing right next to me towards the middle of the street. I was standing towards the curb on the north side, and he was standing more towards the middle of the street.

Q. Did the defendant DeNormand say anything to you as he approached you?

A. Yes. He told us to turn around and march toward the garage and he said, "I guess you know what we are here for."

Q. What happened then when he told you to do that?

A. Well, I just turned around and marched.

Q. You and Cimino? A. That is right.

Q. What happened then?

A. Well, King stuck a gun in my back and DeNormand stuck one in Cimino's back and Cimino was a little ahead of me and he reached the garage doors before I did, and DeNormand asked him to open up the garage doors, and he tried to tell him that he wasn't very familiar with it and DeNormand made some sort of a remark which I don't exactly remember, the exact words to it, but it was in some sense, "You son-of-a-bitch, you had better open up the door and not let the alarm ring." So I tried to explain to DeNormand that he wasn't familiar with the door, that I try to turn the alarm off. So rather than stir them any more, because they were threatening us to a certain extent, I shut the alarm off——

Mr. Packer: I move to strike it out.

The Court: I will order the jury to disregard the phrase "they threatened us."

Tell us only the conversation.

Q. Tell us what they said.

A. Well, as we were walking across the street King told me if I didn't do as I was told I guess I would know what was good for me. So then I opened—Cimino opened the doors and I shut off the burglar alarm and we got inside the garage.

Q. What happened after you shut off the burglar alarm?

A. We were both pushed inside and just as we got inside one of the trucks pulled away.

Q. Then what happened, Mr. Fiak?

A. They told us to march toward the back of the garage.

Q. Toward the back of the garage?

A. That is right.

Q. And then what happened?

A. They told us to get up on the platform and not turn around.

Q. I show you a picture and ask you if you can tell me what this represents (handing to witness)?

A. That is the platform. That is the back of the garage.

Q. Of the Rapid garage? A. That is right.

Q. Is that the platform on which you were told to get up? A. Yes, sir.

Q. Who told you to get up on that platform?

A. King.

Mr. Hilly: Will you mark this for identification, please, Mr. Clerk.

(Marked Government's Exhibit 26 for identification.)

The Court: We will take a recess at this point.

(Short recess.)

Q. (By Mr. Hilly): I show you this picture, Mr. Fiak, and ask you if you can tell me what that represents (handing to witness)?

A. That is the New York terminal on Tenth Avenue.

The Court: I can't hear a word.

Q. Keep your voice up?

A. That is our New York terminal on Tenth Avenue.

Q. Is that the terminal between 23rd and 24th Streets? A. That is right.

Mr. Hilly: Will you mark this for identification, please.

(Marked Government's Exhibit 27 for identification.)

Q. I direct your attention to the lower lefthand corner of Government's Exhibit marked for identification and ask you what that is (handing to witness)?

A. That is the small door entrance where you shut off the burglar alarm.

Q. Is the burglar alarm visible?

A. Yes, sir.

Q. Where is it?

A. It is just inside the door, the lefthand side.

Q. And where is the big door?

A. It is the large door right here (indicating). It is an overhead door.

Q. What do you mean when you say "it is an overhead door"?

A. You pull it up by a chain and it just folds up over the top of the roof.

Mr. Hilly: At this time, if your Honor please, the Government offers in evidence Government's Exhibit 26 for identification and 27 for identification.

(Conference between Mr. Hilly and Mr. Packer off the record.)

Mr. Packer: No objection, if your Honor please. There is some extraneous—I am sorry, I did not want to talk out of turn.

(Conference among Court and counsel, at the bench, off the record.)

(Government's Exhibits 26 and 27 for identification received in evidence.)

Q. Did you get up on the platform?

A. Yes, sir.

Q. Where was Cimino at this time?

A. He was also up on the platform with me.

Q. What happened when you got up on the platform?

A. They told us to face the wall and not look around, and they started to tie us up.

Q. How were you dressed that night?

A. I had a gray overcoat on and a sweater and a pair of pants.

Q. Who tied you up? A. King.

Q. Pardon me? A. King.

Q. Did anyone help him?

A. Well, after I was—my eyes were already covered. I don't know if he finished the job or somebody else did it. I can't remember for sure who did it.

Q. Did you hear any conversation or anything—was anything said while you were being tied up?

A. Yes. After I was—my face was all plastered up I heard him talk to this fellow Oddo asking him to do different things.

Q. How were you tied up?

A. Well, they stuffed a hunk of gauze in my mouth and just wrapped adhesive tape from my chin to the top of my head.

Q. Did they put any gauze underneath the adhesive tape? A. No, sir.

Q. Where was Cimino at that time?

A. He was standing right next to me.

Q. What happened then? In addition to putting gauze on your face was anything done with your hands?

A. Yes, they tied my hands in back of me with twine and then covered it with adhesive tape so that I wouldn't be able to untie the knots.

Q. Was anything done with your feet?

A. Yes; they started——

Mr. Reis: May it please the Court, I object to the question. Let him ask the witness everything that was done instead of leading.

The Court: All right. You are leading the witness.

Mr. Hilly: Very well, your Honor.

Q. What else was done, Mr. Fiak?

A. Well, they tied my feet together and then they told me to take a few steps forward and jump off the platform, that they would catch me.

Q. Did you do that? A. Yes, sir.

Q. Did they catch you? A. Yes, sir.

Q. What happened then?

A. And then they—I was able to take short steps. They told me to walk up back towards the garage again, and I got alongside of the truck that

I had brought down, they lifted me into the cab and tied me to the steering post.

Q. What happened then?

A. Well then, the fellow that was tying me up asked me if I had a knife and I nodded that I did not, so he walked away and came back after a few seconds and he untied my feet from the post and they lifted me out again and carried me toward the back of the garage.

Q. Then what happened?

A. Then they lifted me inside the body and I found Cimino there.

Q. Inside the body of what?

A. The trailer, the trailer that I brought down.

Q. You say you found Cimino in there?

A. Yes.

Q. How do you know that Cimino was in there? Weren't your eyes bandaged?

A. Well, he nudged me when I got in.

Q. Did he say anything?

A. No, he couldn't talk at the time because he was gagged, too.

Q. I show you this picture and ask you if you can tell me what that represents (handing to witness)?

A. That is the side door of the body that they put us inside.

United States of America
Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby

certify that the foregoing pages, numbered from 288 to 298, inclusive, contain true and complete copies of originals thereof on file in said Court, in the case of United States of America, Plaintiff-Appellee, against Kingdon William DeNormand, etc., Joseph Peter Oddo, etc., Joseph Alfred La Cascia, William Joseph King, etc., and John Mugavero, Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereby, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of February in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

[Seal] /s/ ALEXANDER M. BELL,
Clerk.

[Endorsed]: Filed February 10, 1950.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Mon-

day, the 27th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

ORDER GRANTING PETITIONER'S
MOTION FOR REHEARING

Petitioner's motion for rehearing having been heretofore submitted, and due consideration had thereon, It Is Ordered that said motion for rehearing be and the same is hereby granted.

[Title of District Court and Cause.]

ORDER VACATING ORDER GRANTING
MOTION FOR REHEARING

There being some question in the mind of the Court as to its jurisdiction to entertain a motion for rehearing filed more than ten days after the entry of its order denying petition for writ of habeas corpus,

It Is Hereby Ordered that the order granting the motion for rehearing be and the same is vacated and set aside.

The petitioner may file a new petition for writ of habeas corpus, the original order denying petition for writ of habeas corpus being hereby deemed denied without prejudice.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus. Attached are Exhibits A and B.

Return to Order to Show Cause.

Minute Order of June 26, 1950. Order that case be placed on calendar for July 10, 1950, for hearing of Motion to Strike, Order of Submission vacated.

Motion to Strike.

Order that Motion to Strike filed herein shall be deemed to have been filed contemporaneously with the Return to Order to Show Cause.

Order Granting Writ.

Notice of Appeal.

Order Extending Time to Docket.

Designation of Contents of Record on Appeal.

In Case No. 29017

John Mugavero, Petitioner,

vs.

E. B. Swope, etc., Respondent

Petition for Writ of Habeas Corpus ad Subjiciendum.

Order to Show Cause.

Motion to Dismiss Petition for Writ of Habeas Corpus.

Traverse to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus ad Subjiciendum.

Memorandum Opinion.

Order Granting Respondent Time within which to file a Return to Order to Show Cause, and Memorandum of Points and Authorities in Support Thereof.

Return to Order to Show Cause.

Petitioner's Traverse to Respondent's Supplementary Proceedings.

Order Denying Petition for Writ of Habeas Corpus.

Motion for an Order to Grant a Rehearing in Petition for Writ of Habeas Corpus and to Permit the Filing of Substantiating Evidence.

Motion for Permission to Supplement Records to a Motion for an Order to Grant Rehearing in Petition for Writ of Habeas Corpus. Attached are 11 photostatic pages of Testimony of John Thomas Fiak.

Minute Order of March 27, 1950.

Order Granting Petitioner's Motion for Rehearing.

Order Vacating Order Granting Motion for Rehearing.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 19th day of October, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VanBUREN,
Deputy Clerk.

[Endorsed]: No. 12717. United States Court of Appeals for the Ninth Circuit. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. John Mugavero, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 19, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the Ninth
Circuit

No. 12717

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellant,

vs.

JOHN MUGAVERO,

Appellee.

STATEMENT OF POINTS TO BE RELIED
ON IN APPEAL AND DESIGNATION OF
CONTENTS OF RECORD TO BE PRINTED

E. B. Swope, Warden of the United States Peni-
tentiary, at Alcatraz, California, appellant herein,
hereby designates the entire record filed with this
Court as necessary for the consideration of the
appeal, and the following constitute the points to
be relied upon by him on appeal:

1. That the Honorable Herbert W. Erskine,
United States District Judge for the Northern Dis-
trict of California, should have denied the Petition
for Writ of Habeas Corpus filed by appellee before
him;

2. That the Honorable Herbert W. Erskine,
United States District Judge for the Northern Dis-
trict of California, erred when he ordered the ap-
pellee discharged from the custody of the appellant;

3. That the Honorable Herbert W. Erskine,
United States District Judge for the Northern
District of California, erred in holding that the

allegations contained in appellee's Petition for Writ of Habeas Corpus were sufficient in law to justify the relief as prayed for in the said petition;

4. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred when he found that the appellee had suffered double punishment and been twice placed in jeopardy for the same offense;

5. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred in holding that the defense of double jeopardy is cognizable in habeas corpus;

6. That the Honorable Herbert W. Erskine, United States District Judge for the Northern District of California, erred when he looked outside the face of the record to determine whether the appellee had suffered double punishment and been twice placed in jeopardy for the same offense;

7. That the consecutive sentences imposed against the Appellee by the United States District Court for the Southern District of New York in Criminal Cause numbered C. 116/211 on the 16th day of March, 1944, totaling 12 years, constitute a valid existing judgment presently in full force and

effect, and justifiable cause for the present continued detention of appellee by appellant.

Dated: October 25, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed October 25, 1950.

No. 12,717

IN THE

**United States Court of Appeals
For the Ninth Circuit**

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,

VS.

JOHN MUGAVERO,

Appellee.

OPENING BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,
Post Office Building, San Francisco 1, California,

Attorneys for Appellant.



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No. 12,717

IN THE

**United States Court of Appeals
For the Ninth Circuit**

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellant,

vs.

JOHN MUGAVERO,

Appellee.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", granting a writ of habeas corpus, which, in effect, directed the discharge of the appellee from the custody of the appellant. (Tr. 68.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A. Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28 U.S.C.A. Section 2253.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below granting the writ of habeas corpus, which, in effect, directed the discharge of the appellee, an inmate of the United States Penitentiary, Alcatraz, California, from the custody of the appellant, the warden of the said penitentiary. (Tr. 68.)

Prior to the institution of the instant proceedings appellee had filed a petition for writ of habeas corpus in the Court below, in case numbered 29017-E (Tr. 73-80), in which, as in the instant proceedings, he contended that he had suffered double punishment for the same offense, and the Court below issued an order to show cause. (Tr. 80.) Thereupon the appellant filed a motion to dismiss the petition on the ground that the appellee had failed to file a motion in the trial Court to vacate, set aside or correct the sentence heretofore imposed against him as required by Title 28 U.S.C.A. Section 2255, and on the further ground that the said petition failed to state a claim upon which relief can be granted (Tr. 81), to which appellee filed a traverse. (Tr. 82-86.) Thereafter the Court below filed a memorandum opinion denying appellant's motion to dismiss (Tr. 87-93, and Appendix I of this brief, and as reported in *Mugavero v. Swope*, 86 Fed. Supp. 45), and, in conformity with the said opinion, entered an order granting appellant time within which to file a Return to Order to Show Cause and Memorandum of Points and Authorities in support thereof. (Tr. 94.) The appellant thereupon filed a Return to Order to Show Cause incorporating his

supporting authorities in the said return. (Tr. 94-97.) The appellee then filed a pleading which he entitled, "Petitioner's Traverse to Respondent's Supplementary Proceedings" (Tr. 97-98) and a supporting memorandum. (Tr. 99-104.) The matter was once more submitted and the Court below then entered an order denying appellee's application for writ of habeas corpus. (Tr. 104-106, and Appendix II of this brief.) The appellee thereupon filed a motion for rehearing (Tr. 106-110), and a motion for permission to supplement the record by the filing of certain testimony received in evidence by the trial Court. (Tr. 111-123.) The motion for rehearing was granted (Tr. 124), but subsequently vacated by the entry of the following order:

**"ORDER VACATING ORDER GRANTING MOTION
FOR REHEARING**

There being some question in the mind of the Court as to its jurisdiction to entertain a motion for rehearing filed more than ten days after the entry of its order denying petition for writ of habeas corpus,

It Is Hereby Ordered that the order granting the motion for rehearing be and the same is vacated and set aside.

The petitioner may file a new petition for writ of habeas corpus, the original order denying petition for writ of habeas corpus being hereby deemed denied without prejudice.

/s/ Herbert W. Erskine,
United States District Judge.

[Endorsed]: Filed May 10, 1950." (Tr. 124.)

Subsequently the instant proceedings, in case numbered 29753, in which appellee was represented by appointed counsel, were instituted by the filing of another petition for writ of habeas corpus to which, among other things, were attached certain extracts from the testimony received in evidence before the trial Court in the case which resulted in his conviction and incarceration. (Tr. 2-41.) Thereafter an order to show cause was issued to which the appellant filed a return, and in this return he incorporated his supporting authorities and also incorporated, by reference, the entire record of the proceedings in the above-mentioned case numbered 29017-E. (Tr. 41-63.) The appellant also filed a motion to strike from the petition certain matters which he considered evidentiary and immaterial and more particularly moved to strike, on the same ground, the extracts of the testimony which, as above mentioned, were attached to the petition. (Tr. 65-67.) Thereupon, the matter having been submitted, the Court below entered the following "Order Granting Writ" which, in effect, as can be readily seen, directed the discharge of the appellee from the custody of the appellant:

"The writ of habeas corpus is hereby granted for the reasons set forth in the earlier memorandum opinion filed September 23, 1949, denying respondent's motion to dismiss, and on the additional authority of *Clawans v. Rives*, 104 F. (2d) 240, subsequently brought to the attention of this Court, on the issue of the propriety of habeas corpus to test the claim of double jeop-

ardy. Petitioner will remain in custody, however, pending appeal from this order by respondent.

Dated: July 31st, 1950.

/s/ Herbert W. Erskine,
United States District Judge.

[Endorsed]: Filed July 31, 1950." (Tr. 68.)

From this latter order the appellant now appeals to this Honorable Court. (Tr. 69.)

FACTS OF THE CASE.

The facts leading up to the filing of the instant petition may be found in the decision of the United States Court of Appeals for the Second Circuit in *United States v. DeNormand et al.*, 149 F. (2d) 622, as modified by a correction as set forth in its subsequent opinion in the cases of *Oddo v. United States* and *United States v. DeNormand*, 171 F. (2d) 854, certiorari denied, 337 U.S. 943, in a footnote at page 856, decisions which appellant herein incorporated by reference in these habeas corpus proceedings.

Appellee herein and four others, included among whom were William DeNormand and Joseph Peter Oddo, were convicted in the Southern District of New York on March 9, 1944, on an indictment in nine counts involving two trailer trucks, numbered 3 and 4, and their contents, eight of which counts charged violations of Title 18 U.S.C.A. Section 409*

*See Appendix III.

(now Sections 659 and 2117) and the ninth a violation of the conspiracy statute, Title 18 U.S.C.A. Section 88 (now Section 371). Appellee was sentenced on March 16, 1944 to an aggregate term of 12 years; 5 years on counts 1 and 2, ordered to run concurrently; 5 years on counts 3 to 8, inclusive, ordered to run concurrently, but consecutively to the sentences on counts 1 and 2; and 2 years on count 9, ordered to run consecutively to the other sentences imposed. Each of the first eight counts was based on Title 18 U.S.C.A. 409 and charged that the defendants "unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc." goods belonging to various shippers or consignees and forming part of an interstate shipment of freight. (Tr. 46-54.)

These convictions were affirmed on May 14, 1945. *United States v. DeNormand, et al.*, supra. On appeal, it was contended, among other things, that even if the proof showed the defendants guilty of unlawfully taking both trucks, their acts constituted only a single crime and hence the imposition of cumulative sentences was illegal. The Second Circuit held that the substantive offense of taking possession of truck 3 and its contents is distinct from that of taking possession of truck 4 and its contents. The acts of taking were distinct, citing *Blockburger v. United States*, 284 U.S. 299 and *United States v. Busch*, 64 F. (2d) 27, certiorari denied, 290 U.S. 627.

Thereafter, and on November 30, 1947, defendant Oddo moved under Rule 35 of the Federal Rules of

Criminal Procedure to vacate as illegal so much of the sentence as rests on counts 3 to 8 of the indictment. The motion was denied on March 15, 1948, and the order of the District Court was affirmed, *Oddo v. United States*, and *United States v. DeNormand*, supra. Oddo argued that seizure of truck 3 and its contents was a single crime, and similarly the seizure of truck 4 and its contents, and since count 1 covered some of the goods on each truck, the sentence imposed under count 1 was in part for the theft of the contents of truck 4, and the imposition of the additional sentence under counts 3 to 8 was a second sentence for the same offense. (It is this contention which is the basis for appellee's claim for relief in our case at bar.) The movant cited in support of his contention *Robinson v. United States*, 143 F. (2d) 276 and *Kerr v. Squier* (C.C.A. 9), 151 F. (2d) 308. The Second Circuit rejected this contention on the authority of *United States v. DeNormand, et al.*, supra, and *Crespo v. United States*, 151 F. (2d) 44, certiorari dismissed, 327 U.S. 758. The Court further held that the test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count, citing *United States v. Baerman*, 24 Fed. Cases 1065.

Appellee, having completed service of the five-year sentence imposed on counts 1 and 2 and the two-year sentence imposed on count 9, less deductions for good time, attacked by habeas corpus in the Court below the legality of the five-year sentence imposed

on counts 3 to 8, inclusive, contending, as his co-defendant Oddo unsuccessfully did, as above indicated, before the trial Court and the Second Circuit Court, that in serving this latter (five-year) sentence he was suffering double punishment and being twice placed in jeopardy for the same offense. With this contention, contrary to the decisions of the trial Court and the Second Circuit Court, the Court below agreed.

CONTENTIONS OF APPELLANT.

The seven points designated by the appellant as the grounds to be relied on by him on appeal (Tr. 128-129) may be summarized as follows:

1. The defense of double jeopardy is not cognizable in habeas corpus.
2. A Court cannot look outside the face of the record in a habeas corpus proceeding to determine whether a defendant is suffering double punishment and being twice placed in jeopardy for the same offense.
3. The appellee is not suffering double punishment and has not been twice placed in jeopardy for the same offense.

ARGUMENT.

I.

THE DEFENSE OF DOUBLE JEOPARDY IS NOT
COGNIZABLE IN HABEAS CORPUS.

As to whether the issue of double jeopardy may be raised in a collateral attack by way of habeas corpus, the Courts are at variance. The order of the Court below entered on December 9, 1949, dismissing the petition for writ of habeas corpus in case numbered 29017-E, pointed out the present differences in this connection which exist in both the Supreme Court and this Honorable Court. The Court below cited *Ex parte Neilsen*, 131 U.S. 176; *Ex parte Bigelow*, 113 U.S. 328; *Johnston v. Lagomarsino* (C.C.A. 9), 88 F. (2d) 86; and *Kerr v. Squier*, supra, wherein the issue was allowed to be raised by habeas corpus. See also *Clawans v. Rives*, 104 F. (2d) 240, cited by the Court below in its subsequent order granting the writ. It then cited *In re Snow*, 120 U.S. 274; *Kastel v. United States* (C.C.A. 2), 30 F. (2d) 687; and *Crapo v. Johnston* (C.C.A. 9), 144 F. (2d) 863, which either hold or infer by *dicta* that the issue may not be raised. The Court below, however, decided the issue before it without ruling on the issue of double jeopardy. Appellant, in view of the conflict which exists relative to this question, respectfully urges this Honorable Court to resolve this issue and, in accordance with the legal principle which limits the function of the writ of habeas corpus to the traditional matters of jurisdiction, constitutional rights of a defendant, and the legality of sentence,

Sunal v. Large, 332 U.S. 174;

U. S. ex rel. Kulich v. Kennedy, 157 F. (2d) 811;

Knewel v. Egan, 268 U.S. 442;

Goto, et al., v. Lane, 265 U.S. 393;

hold that the defense of double jeopardy does not constitute such a traditional constitutional right of a defendant as to warrant relief by way of collateral attack.

II.

A COURT CAN NOT LOOK OUTSIDE THE FACE OF THE RECORD IN A HABEAS CORPUS PROCEEDING TO DETERMINE WHETHER A DEFENDANT IS SUFFERING DOUBLE PUNISHMENT AND BEING TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE.

Assuming, *arguendo*, that the defense of double jeopardy can be raised upon an application for writ of habeas corpus, the law seems to be that in such a collateral proceeding the Court can not look outside the face of the record to determine whether or not there has been a violation of this guarantee. In *McKee v. Johnston*, 109 F. (2d) 273, 275, this Honorable Court, in analyzing its holding in the case of *Johnston v. Lagomarsino*, *supra*, upon which appellee herein strongly relies, and upon which the Court below largely based its decision, said:

“* * * It may be assumed, and the assumption is probably warranted by the language of the indictment, that each taking was part of a continuous transaction. However, it does not appear that the takings were simultaneous. Since the record is not before us we are entitled to assume,

in support of the judgment, that the takings were not simultaneous and that they were selective. Ex parte Yarbrough, Ku-Klux Cases, supra, 110 U.S. pages 653, 654, 48 S. Ct. 152, 28 L. Ed. 274."

Furthermore, in *Kerr v. Squier*, supra, at page 309, the only other case upon which appellee herein relied and upon which the Court below based its decision in ordering the appellee released from the custody of the appellant, this Honorable Court placed its stamp of approval on the rule which it laid down in *McKee v. Johnston*, supra, when, among other things, it asserted:

"* * * While every presumption must be indulged in favor of the judgment and sentence, *Hall v. Johnston*, Warden, 9 Cir., 86 F. 2d 820, just decided, but where *upon the face of the record* it is disclosed that the offense charged involved several separate articles, not charged as separately taken, but which may have been simultaneous and continuously taken, a different relation obtains." (Italics supplied.)

Inasmuch as each count of the indictment clearly states a separate offense against the laws of the United States and there is nothing in the judgment to indicate anything to the contrary, it is clear that the record, on its face, shows that the appellee has not suffered double jeopardy, and accordingly it is respectfully submitted he is not entitled to relief by habeas corpus.

III.

THE APPELLEE IS NOT SUFFERING DOUBLE PUNISHMENT
AND HAS NOT BEEN TWICE PLACED IN JEOPARDY FOR
THE SAME OFFENSE.

Aside from the question as to the availability of the defense of double jeopardy in a habeas corpus proceeding and the circumstances, if any, under which the defense is permitted in such a proceeding, the issue now to be considered is whether, as the Court below found, the appellee has been twice placed in jeopardy, and is suffering double punishment, for the same offense. Appellant respectfully asserts a contrary finding should have been made by the Court below.

As indicated herein, appellee's claim for relief, and the finding of the Court below, are based on the decisions of this Honorable Court in *Johnston v. Lagomarsino*, supra, and *Kerr v. Squier*, supra. Appellee argued, and the Court below stated it was compelled to agree, that these decisions are in direct conflict with the holding of the United States Court of Appeals for the Second Circuit in *United States v. DeNormand, et al.*, supra, and *Oddo v. United States* and *United States v. DeNormand*, supra, cases on which appellant herein relies. It should be noted that the *Lagomarsino* and *Kerr* cases arose under the Mail Robbery Statutes, and the *DeNormand* and *Oddo* cases, under the provisions of Title 18 U.S.C.A., Section 409, and that, as was suggested by the United State Court of Appeals for the Second Circuit, there has been no decision squarely in point contrary to

that which it reached in these latter cases. As a matter of fact, in *'Oddo v. United States and United States v. DeNormand*, supra, although the Appellate Court referred to the case of *Kerr v. Squier*, supra, it gave no indication that this opinion was directly in conflict with its holding in the earlier *DeNormand* case, when, after mentioning the *Kerr* case, it went on, among other things, to say, at page 856:

“* * *, we think that under the National Stolen Property Act, 18 U.S.C.A. §409 (now §§659, 2117), the taking of cases of merchandise belonging to different owners and constituting independent interstate shipments, though contained in one vehicle, may be regarded as separate offenses for which separate punishment can be imposed. The intention of Congress, we believe, in enacting §409 was to protect each and every ‘interstate shipment’ of goods against felonious taking. We said substantially this in considering the somewhat similar contention asserted in the former appeal that the taking of both trucks constituted only a single crime. *United States v. DeNormand*, 2 Cir., 149 F. 2d 622, at page 625.”

Aside from the contentions hereinabove advanced there is one important point, viz., Count 2 of the indictment, which appears to have been heretofore overlooked in a consideration of the matter by the United States Court of Appeals for the Second Circuit, by the Court below in its memorandum opinion as reported in 86 Fed. Supp. 45, Appendix I of this brief, and by the appellant himself in his arguments before the Court below. It is a point which was raised

for the first time by the Government in its memorandum filed in its successful opposition to Oddo's petition for a writ of certiorari, 337 U.S. 943. It is a point upon which appellant herein strongly relies, a point which, if resolved in appellant's favor, will make it unnecessary for this Honorable Court to determine, in light of its opinions in the *Lagomarsino* and *Kerr* cases, *supra*, whether the United States Court of Appeals for the Second Circuit was correct in deciding that one who steals a vehicle containing several shipments or consignments of goods commits as many offenses, under the statute, as there are shipments in the vehicle. The point follows:

It was the manifest intent of the trial judge to impose two cumulative sentences for the thefts of the two trucks and their contents. That intent should be effectuated if it is legally possible to do so. It is legally possible to do so if the concurrent sentences on counts 3 to 8 be treated as running consecutively to the sentence on count 2, rather than count 1. Count 1 related to merchandise on truck No. 3 and truck No. 4. Count 2, which appellee ignored, as did his codefendant, Oddo, and which appellant himself overlooked in the Court below, related exclusively to merchandise on truck No. 3. Counts 3 to 8 related exclusively to merchandise on truck No. 4. (See instant petition, par. XI, Tr. 6.) The concurrent sentences on the latter counts could therefore be validly made to run from the expiration of the sentence on count 2. It is true that the actual sentence pronounced

specified that the concurrent sentences on counts 3 to 8 should run consecutively to the concurrent "sentences" on both counts 1 and 2. But there is no more reason for singling out count 1 as the count at whose expiration the sentences on counts 3 to 8 should commence than there is for selecting count 2 for that purpose. Appellee, in order to defeat the intent of the trial judge, chose to ignore count 2 and regard the concurrent "sentences" on counts 1 and 2 as being the same thing as a single sentence on count 1. Appellant submits that, by regarding the sentences on counts 3 to 8 as running consecutively to that one of the first two counts which involved only goods on truck No. 3, viz., count 2, and ignoring count 1 for present purposes, appellee's objections to the sentence received are overcome and, more importantly, the trial judge's clear intent to sentence appellee to ten years' imprisonment on the substantive counts is preserved. "The Constitution does not require that sentencing be a game in which a wrong move by the judge means immunity for the prisoner."

Bozza v. United States, 330 U.S. 160, 166-167.

Accordingly the appellee is in no position to complain that he is suffering double punishment, and has been twice placed in jeopardy for the same offense.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below should be reversed and the case remanded with directions that it enter a judgment denying the appellee the relief for which he prayed.

Dated, San Francisco, California,
January 8, 1951.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.



Appendix

I.

(Title of District Court and Cause)

“MEMORANDUM OPINION

This is a petition for a writ of habeas corpus. An order to show cause was issued, whereupon respondent replied with a motion to dismiss the petition on the following grounds:—

1. That petitioner has not filed a motion in the trial court to vacate the sentence imposed as per 28 USCA 2255;

2. That the petition fails to state a cause of action upon which relief can be granted.

(1) Necessity for Motion to Trial Court.

Section 2255 of Title 28 does require such motion to the trial court before a habeas corpus petition will be heard, with the following exception, which is the last clause of section 2255: ‘* * * unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.’ Therefore the question is whether such remedy would be adequate or effective in the instant case.

Petitioner alleges correctly that his co-defendant filed such a petition in the trial court predicated upon the same grounds advanced herein by petitioner. This motion was denied by the trial court, upheld by the Circuit Court of the 2nd Circuit in the case

of *Oddo v. United States*, 171 F. (2d) 854, a decision which, as will be pointed out below, seems contrary to the decisions of the 9th Circuit on the point. Thus, it seems logical to conclude that a motion by petitioner to the trial court would be ineffective.

The applicability of this last clause of Section 2255 has apparently risen in only two cases. In *St. Clair v. Hiatt*, 83 F. Supp. 585, petitioner had not complied with the requirement of motion to the trial court prior to bringing of the writ of habeas corpus. However, prior to the effective date of the statute, the petitioner had carried on correspondence with the trial judge, which the latter declared he would treat as a motion to correct the sentences. No appeal was taken from the decision of the trial judge not to correct said sentences. Nevertheless the Court hearing the habeas corpus petition held that there was sufficient compliance with Section 2255.

The most analogous case to the present one is *Stidham v. Swope*, 82 F. Supp. 931, in which Judge Denman of the Ninth Circuit Court of Appeals granted the petition for the writ despite the failure of the petitioner to move the trial court to vacate the sentence, holding that such a motion was inadequate and ineffective to test the legality of petitioner's detention. He based this holding on the fact that the petitioner in Alcatraz was 1500 miles from the sentencing court, with the attendant expense, time and trouble involved in the motion and the consequent appeal, whether or not the petitioner was personally removed back to the locale of the sentencing court,

and on the fact that the case could be much more summarily disposed of in San Francisco, since the Warden at Alcatraz was easily available. Judge Denman was undoubtedly influenced by the fact the petitioner in that case apparently had valid grounds for asking for release. With that factor in mind it is probably correct to state that the question of whether a motion to the sentencing court would be effective or not depends to a large extent upon our conclusions as to the substantive merits of the petitioner's case.

(2) Substantive Basis for Petition.

Unfortunately, in his petition for dismissal, respondent has chosen to rest his case primarily on the issue of the necessity of motion to the sentencing court, and discusses the substantive issue only to the point of citing *United States v. de Normand*, 149 F. (2d) 622, which was the original appeal by petitioner from his judgment of conviction. This, however, does not meet the main objection of petitioner, which is that the decisions of the 9th Circuit are contrary to those of the 2nd Circuit, which decided the *de Normand* case, and also the case of *Oddo v. United States*, 171 F. (2d) 854, brought by petitioner's co-defendants, where the exact point under consideration here was decided adversely to the petitioner.

The facts underlying this petition are somewhat as follows.

Petitioner was indicted and convicted on nine separate counts. Count 1 charged the theft from 'cer-

tain trailer trucks' of an interstate shipment of freight consisting of 1005 cases of whiskey. At the trial it was proven that 590 of such cases were in one truck, called truck #3, and 415 in another truck, called truck #4. Counts 3 to 8 charged the theft from 'a certain trailer truck' of an interstate shipment of freight consisting of numerous cases of wine, tomato juice, and so forth. The proof showed that all of the merchandise in counts 3 to 8 were in truck #4. Count 9 charged a violation of the conspiracy statute. Petitioner was convicted on all counts, and was sentenced to 5 years for count 1 and 5 years for counts 3 to 8, and 2 years for count 9, to run consecutively. It might be here noted that truck #4 was a completely closed truck with locked doors.

Petitioner argues here, as did the petitioner in the identical case of *Oddo v. United States*, *supra*, that since count 1 covered the goods in truck #3 plus some of the goods in truck #4, and since, therefore, possession actual or constructive of truck #4 was necessary in order to convict under count #1, as found in *United States v. de Normand*, *supra*, there was no additional criminal act for which he could be convicted, and that the imposition of the additional five years under counts 3 to 8 was a second sentence for the same offense. In substance, the contention is that a thief who steals a vehicle and its contents commits but one theft, even though the vehicle contains packages of different kinds of goods belonging to different owners.

As the Court pointed out in *Oddo v. United States*, *supra*, the question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers. That court, the 2nd Circuit, could discover no controlling Supreme Court authority, and decided that counts 3 to 8 charged offenses separate from the crime charged in count 1. The reasoning of that court is based primarily upon the following quoted paragraph:—

‘The test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count. (Citing cases.) Proof that the appellant feloniously took possession of the 415 cases of whiskey belonging to Park & Tilford Corporation in truck #4 and involved in count 1 would not have proved that he feloniously took possession of the different merchandise of different ownership specified in counts 3 to 8.’ (171 F. (2d) 854 at 857.)

However, it appears that the court overlooked the important fact that truck #4 was a locked truck and was never moved or tampered with. Therefore, if, as was determined, the petitioner had possession of truck #4 and the 415 cases of whiskey involved in count 1, how could it be held that he did not at the same time and place have felonious possession of the remainder of the merchandise in truck #4? Evidence to support a finding of possession of truck

#4 and of the 415 cases, will also prove possession of the rest of the merchandise, enumerated in counts 3 to 8.

Turning from the facts, for a moment, and the logical difficulties in the opinion of the 2nd Circuit, to the cases in the 9th Circuit, it seems that the latter are contrary, at least in theory, to the Oddo case. Thus in *Kerr v. Squier*, 151 F. (2d) 308, it was held that three separate counts, charging theft of three mail bags from a post office, justify but one 5 year sentence, and require discharge on habeas corpus of the defendant who had served a five-year sentence on one of such counts, the trial court having found that the bags were simultaneously taken in one transaction. Again in *Johnston v. Logomarsino*, 88 F. (2d) 86, it was held that a taking of three letters in a simultaneous and single transaction constitutes a single offense, and the petitioner was ordered released upon the service of the first of three sentences for the taking of the letters.

It is difficult for me to distinguish the present case from the reasoning in those two 9th Circuit cases; it would follow that in the instant case there was not only one transaction, but only one act which could not be divided into separate offenses. Since petitioner has served a period of time equal to the sentence imposed for counts 1 and 9, my opinion is that the respondent's petition to dismiss should be denied, without prejudice to respondent's right to

more fully answer the substantive contentions of the petitioner.

Dated: September 22nd, 1949.

/s/ Herbert W. Erskine,
United States District Judge.

(Endorsed): Filed September 23, 1949."

II.

(Title of District Court and Cause)

"ORDER

In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in *Kerr v. Squier*, 151 F. (2d) 308, and *Johnston v. Logomarsino*, 88 F. (2d) 86. In his return to the order to show cause, the respondent advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The decisions on this point, both in the Supreme Court and in the Ninth Circuit are not in harmony.

See:

Ex parte Nielsen, 131 U.S. 176;

Ex parte Bigelow, 113 U.S. 328;

Kerr v. Squier, *supra*;

and

Johnston v. Logomarsino, *supra*.

All these cases allow the issue to be raised by habeas corpus petition.

In *re Snow*, 120 U.S. 274; *Kastel v. U.S.*, 30 F. (2d) 687; *Crapo v. Johnston*, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

Remaley v. Swope, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen, 131 U.S. 176, 183;

Kerr v. Squier, 151 F. (2d) 308;

McKee v. Johnston, 109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged

in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949.

/s/ Herbert W. Erskine,
United States District Judge.

(Endorsed): Filed December 9, 1949."

III.

Title 18 U.S.C.A., Section 409 reads in pertinent part as follows:

"Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods

or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both, * * *."

No. 12718

United States
Court of Appeals
for the Ninth Circuit.

WILLIAM EWALD ANDERSON,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration
and Naturalization Service, for the Seattle
District,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington
Northern Division.

FILED

DEC - 9 1950

PAUL P. O'BRIEN,
CLERK



No. 12718

United States
Court of Appeals
for the Ninth Circuit.

WILLIAM EWALD ANDERSON,

Appellant,

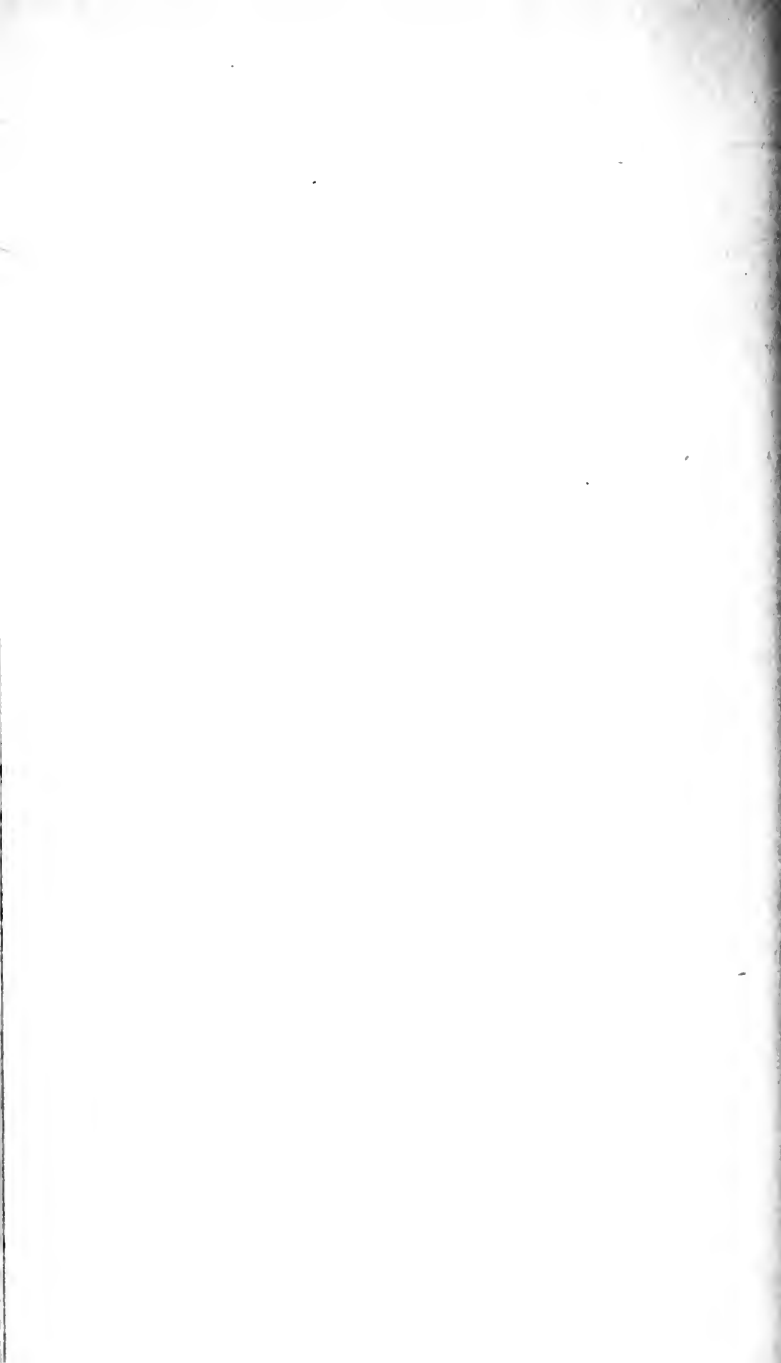
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2083

In the Matter of

The Petition of WILLIAM EWALD ANDERSON,
for Writ of Habeas Corpus.

AMENDED PETITION FOR WRIT
OF HABEAS CORPUS

Comes now William Ewald Anderson, and petitions this Court to issue a writ of habeas corpus to inquire into his detention by the Seattle Immigration authorities at the Port of Seattle, and shows the Court as follows:

I.

That this petitioner was born in the United States on August 16, 1902, and some time thereafter went to Canada to live. That in 1926 he became a naturalized Canadian citizen. Then in 1935 he resumed his residence in the United States, and in 1938 went to Canada in connection with his business as an official of the International Woodworkers of America. Then on January 3, 1939, he applied for readmission to the United States and was excluded by the Immigration Service at the Port of Blaine, Washington. That thereafter petitioner applied for an Immigration visa to the American Consul at Vancouver, British Columbia, and on August 8, 1939, an Immigration visa was issued to him. That

thereafter petitioner again applied for readmission to the United States, and was again excluded, and that an appeal was taken from such exclusion decision. That on January 3, 1940, petitioner reentered the United States through the Port of Blaine, Washington, and upon arrival in the United States reported to the Immigration authorities. That thereafter a warrant of deportation was issued on January 22, 1940, which said warrant charged that the petitioner entered the United States without permission and within one year following his exclusion and deportation. The Immigration authorities then found that petitioner was subject to deportation, and recommended his deportation to Canada.

II.

That thereafter petitioner remained in the United States and the Immigration authorities again considered his case on September 18, 1942, wherein petitioner applied for discretionary relief under Section 19(c) of the Act of 1917 as amended by the Alien Registration Act of 1940. That at the conclusion of said hearing the Presiding Inspector again recommended that petitioner be deported. That thereafter an appeal was taken before the Board of Immigration Appeals on such order of deportation, and said appeal was dismissed, and petitioner is now being held in custody by said Immigration authorities for deportation at Seattle.

III.

That your petitioner is not being held nor being

ordered deported under or by virtue of any judgment, decree, final order or process except by order of the Immigration authorities, as aforesaid.

IV.

That at the hearings held by the Immigration authorities the foregoing facts detailed herein affirmatively appeared, and it further appeared that petitioner was not a member of the Communist Party nor was he likely to become a public charge. That it further appeared affirmatively from the records and files herein that the hearings were not conducted in accordance with the law as applied to such matters, and that in ordering petitioner deported the Immigration officials have abused their discretion. That their finding that petitioner is a Communist or member of the Communist Party is not based upon reasonable evidence or fact, and that testimony and exhibits at said hearings corroborate the fact that petitioner is American born, is not a member of the Communist Party, and that under the rules of evidence as set forth in the Rules of Evidence in the United States Courts in such cases there is no substantial evidence to the contrary, and that under the laws of the United States and the decisions of the Courts of the United States said order of deportation is made after an improper and unlawful hearing, and the alleged ground that the petitioner is a Communist is based upon suspicion and conjecture, and that the Immigration officers in ordering your petitioner deported have abused their discretion, and your petitioner has not

had a fair trial, and is, therefore, entitled to have an order to show cause issued herein requiring the District Director to appear and show cause why the prayer of petitioner's order to show cause should not be granted.

Wherefore, your petitioner prays that an order to show cause be issued out of this court ordering and directing said District Director to appear and show cause, if any he may have, in this court on the day of, 1948, at the hour of . . m., why a writ of habeas corpus should not be issued as prayed for herein; and your petitioner further prays that a writ be issued directing said District Director to have your petitioner appear before this court in the United States District Court for the Western District of Washington, Northern Division, at the Federal Building in Seattle, Washington, and at such time as in said writ may be named to do and receive what shall then and there be considered concerning your petitioner, together with the time and cause of his detention.

/s/ WILLIAM EWALD ANDERSON,
Petitioner.

State of Washington,
County of King—ss.

William Ewald Anderson, being first duly sworn on his oath deposes and says: That he is the petitioner herein; that he has read the foregoing petition, knows the contents thereof and believes same to be true.

/s/ WILLIAM EWALD ANDERSON.

Subscribed and Sworn to before me this 2nd day of September, 1948.

[Seal] /s/ EDWARDS MERGES,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed September 7, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

On reading the petition on file herein wherein and whereby William Ewald Anderson petitions this Court to issue a writ of habeas corpus to inquire into his detention by the Seattle Immigration authorities at the Port of Seattle; now, therefore

It Is by This Court Ordered, Adjudged and Decreed that the said District Director of Immigration be ordered to show cause in the courtroom of this Court in the United States Court House in Seattle, Washington, on the 1st day of October, 1948, at the hour of 1:30 p.m. on said date, why said writ should not issue.

It Is Further Ordered that, pending this petition, petitioner shall deposit with the said District Director such sum or sums, if any, as may be required by said District Director for petitioner's maintenance at the Immigration Station.

Done in Open Court this 7th day of September, 1948.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ EDWARDS MERGES,
Attorney for Petitioner.

[Endorsed]: Filed September 7, 1948.

[Title of District Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE

Comes now R. P. Bonham, Respondent, above named, and for answer to the petition herein, respectfully shows to the Court:

I.

Answering Paragraph I of the petition, respondent admits the petitioner was born in the United States on August 16, 1902, and some time thereafter went to Canada to live. The respondent also admits that the petitioner became naturalized as a Canadian citizen. The respondent further admits that the petitioner entered the United States in 1935 and that he went to Canada in connection with his business as an official of the International Woodworkers of America in 1938. The respondent admits that on January 3, 1939, the petitioner applied for readmission to the United States and was excluded by the Immigration Service at the port of Blaine, Washington. The respondent further admits that thereafter petitioner applied for an immigration visa to the American Consul at Vancouver, British Columbia, and that on August 8, 1939, an immigra-

tion visa was issued to him. The respondent also admits that thereafter the petitioner again applied for readmission to the United States, and was again excluded, and that an appeal was taken from such exclusion decision. The respondent admits that the petitioner reentered the United States on January 3, 1940, at or near Blaine, Washington, and avers that the petitioner evaded inspection by officers of the Immigration and Naturalization Service and that he surrendered himself to the Immigration authorities in Aberdeen, Washington. The respondent avers that thereafter a warrant of arrest was issued on January 22, 1940, which said warrant charged that the petitioner entered the United States without permission and within one year following his exclusion and deportation. The respondent admits that the Immigration authorities then found that petitioner was subject to deportation, and recommended his deportation to Canada.

II.

Answering Paragraph II of the petition, respondent admits that thereafter the petitioner remained in the United States, and the Immigration authorities again considered his case on September 18, 1942, wherein petitioner applied for discretionary relief under Section 19(c) of the Act of 1917 as amended by the Alien Registration Act of 1940. The respondent also admits that at the conclusion of said hearing the Presiding Inspector again recommended that petitioner be deported. The respondent further admits that thereafter an appeal

was taken before the Board of Immigration Appeals on such order of deportation, and said appeal was dismissed.

III.

Answering Paragraph III of the petition, the respondent admits that the petitioner is not being held nor being ordered deported under or by virtue of any judgment, decree, final order or process except by order of the Immigration authorities, as aforesaid.

IV.

Answering Paragraph IV of the petition, the respondent avers that at the hearings held by the Immigration authorities the foregoing facts detailed herein affirmatively appeared and that it further appeared that the petitioner was a member of the Communist Party. The respondent avers that it further appeared affirmatively from the records and files herein that the hearings were conducted in accordance with the law as applied to such matters and that in ordering the petitioner deported the Immigration officials have not abused their discretion. The respondent further avers that the finding of the Immigration authorities that the petitioner was a Communist or a member of the Communist Party is based upon reasonable evidence or fact, and that the testimony and exhibits at said hearing corroborate the fact that the petitioner was a member of the Communist Party, and that under the rules of evidence as set forth in the Rules of Evidence in the United States Courts in such cases

there is substantial evidence in support thereof. The respondent admits that the petitioner is American-born and avers that under the laws of the United States and the decisions of the Courts of the United States said order of deportation is made after a proper and lawful hearing and that the ground that the petitioner was a Communist is not based upon suspicion and conjecture, and that the Immigration officers in ordering your petitioner deported have not abused their discretion, and that the petitioner has had a fair trial.

And for Answer to the Order to Show Cause, Respondent Respectfully Represents and Shows to This Honorable Court:

I.

That he is holding the petitioner for deportation to Canada, the country of his citizenship and the country from which he entered the United States on the 3rd of January, 1940, pursuant to a warrant of arrest issued by Turner W. Battle, Assistant Secretary of Labor on the 22nd of January, 1940, charging that the petitioner who entered this country at Blaine, Washington, on the 3rd day of January, 1940, has been found in the United States in violation of the immigration laws thereof and is subject to be taken into custody and deported subject to the following provisions of law, and for the following reasons: The Immigration Act of 1917, in that he entered without inspection; and the said Act as amended by the Act of March 4, 1929, in that he entered the United States within one

year from the date of exclusion and deportation, consent to reapply for admission not having been granted.

II.

That said warrant was served on the petitioner on the 19th of February, 1940, and that petitioner was afforded a hearing thereunder to show cause why he should not be deported from the United States. Petitioner was represented by counsel of his own selection and at his own expense.

III.

That under the record, and in accordance with the provisions of law, the petitioner is subject to deportation.

IV.

That on the 5th of January, 1948, A. R. Mackey, Chief, Exclusion and Expulsion Section, Immigration and Naturalization Service, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, issued a warrant of deportation commanding that petitioner be deported to Canada on the following charges: The Immigration Act of 1917, in that he entered without inspection; the Act of February 5, 1917, as amended, in that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted by the proper authority; the Immigration Act of May 26, 1924, in that, at the time of entry he was an immigrant not in possession of a valid immigration visa and

not exempted from the presentation thereof by said Act or regulations made thereunder; and the Act of October 16, 1918, as amended, in that he returned to or reentered the United States, after having been excluded and deported, or arrested and deported in pursuance of the provisions of said Act, which relates to anarchists and similar classes.

V.

The certified record of the Department of Justice relating to the deportation proceedings against the said petitioner, the original warrant of arrest and the original warrant of deportation, are attached hereto and made a part and parcel of this return, as fully and completely as though set forth in detail.

Wherefore Respondent prays that the rule to show cause be dismissed, and the petition for the writ be denied.

/s/ R. P. BONHAM,
District Director, Immigration and Naturalization
Service for the Seattle District.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney,
Attorneys for Respondent.

United States of America,
State of Washington,
County of King—ss.

R. P. Bonham, being first duly sworn, on oath deposes and says: That he is the respondent in the above-entitled action; that he has read the foregoing answer to the petition and order to show cause herein, knows the contents thereof and that the same is true as he verily believes.

/s/ R. P. BONHAM.

Subscribed and sworn to before me this 22nd day of September, 1948.

/s/ MILDRED GRANGER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed October 1, 1948.

[Title of District Court and Cause.]

ORDER

This matter having come on regularly for hearing before the Court upon the motion of the petitioner duly made in open court for the substitution of John P. Boyd for R. P. Bonham, as District Director of Immigration of the United States for the Western District of Washington; and it appearing to the Court that good cause exists therefor, now,

It Is Hereby Ordered that John P. Boyd be substituted for R. P. Bonham as respondent herein.

Done in Open Court this 21st day of July, 1949,
as of July 19, 1949.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ EDWARDS MERGES,
Counsel for Petitioner.

Approved:

/s/ JOHN E. BELCHER,
Asst. U. S. Attorney.

[Endorsed]: Filed July 21, 1949.

[Title of District Court and Cause.]

MOTION FOR ORDER GRANTING WRIT OF
HABEAS CORPUS NOTWITHSTANDING
THE ORAL DECISION OF THE COURT

Comes Now the petitioner, William Ewald Anderson, and respectfully moves the court for a reconsideration of the entire record of the case herein and for an order and decree, granting Writ of Habeas Corpus as prayed for herein notwithstanding the oral decision of the court.

This motion is based upon the records and files herein and upon the affidavit of Edwards E. Merges, attorney for the petitioner.

/s/ EDWARDS MERGES.

State of Washington,
County of King—ss.

AFFIDAVIT

Edwards E. Merges, being first duly sworn, on oath deposes and says: That he is the attorney for the petitioner herein, and that the records and files in this case show that the Board of Immigration Appeals did not render final decision in this case until on or about the 5th day of January, 1948, and that thereafter and on March 12, 1948, the petitioner made application for a Stay of Deportation and thereafter on May 7, 1948, the petitioner requested a reopening of the proceedings in this case to permit him to present additional evidence, and that said petitions for reopening and said decision in this case was not rendered under or in conformance with the Administrative Procedures Act of June 11, 1946, and that said Administrative Procedures Act was in full force and effect during the time that the above-entitled cause was under consideration by the Board of Immigration Appeals and was not considered or adjudicated in accordance with said Act by the Board of Immigration Appeals, and that other proceedings were had as shown by the records and files herein in this case subsequent to the passage and going into effect of said Administrative Procedures Act. That in the case of *Wong Yang Sung v. McGrath*, Vol. 70, 8, 445 Supreme Court Reporter Advance Sheets, the Supreme Court of the United States has recently held the Administrative Procedures Act to be ap-

plicable to deportation hearings, and that accordingly, the hearing herein is invalid and void, but that said Wong Yang Sun decision had not been made nor was known to the court at the time of the oral opinion in the above-entitled case, but that by reason of the said Wong Yang Sung decision, the petitioner herein is entitled, in the opinion of affiant, to issuance of a Writ of Habeas Corpus and affiant respectfully asks the court to reconsider this case and the records and files herein in light of the Wong Yang Sung case, *supra*.

/s/ EDWARDS MERGES.

Subscribed and sworn to before me this 16th day of March, 1950.

/s/ ARTHUR G. DUNN, JR.,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1950.

United States District Court, Western District of
Washington, Northern Division

No. 2083

In the Matter of

The Petition of WILLIAM EWALD ANDERSON
for a Writ of Habeas Corpus

June 22, 1950

COURT'S ORAL DECISION

Black, Judge:

The court heretofore on November 4, 1949, after careful consideration of all the records, exhibits, evidence and issues involved, announced that the petition for a writ of habeas corpus was denied, at which time counsel were advised that later some of the reasons which appealed to the court as supporting such decision would be stated. On December 14, 1949, in pursuance of such advice of November 4, 1949, the court rendered its oral opinion.

After findings of fact, conclusions of law and decree were presented for entry and while the court was considering certain proposed changes as to the findings of fact, the petitioner on March 17, 1950, and after the decision of February 20, 1950, of the United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, filed a motion asking the court for a reconsideration of the entire record and for the granting of the writ of habeas corpus

notwithstanding such oral decision of the court. Respective counsel were accorded full opportunity to and did argue every phase of the entire matter from the inception as they desired.

While counsel for petitioner in connection with such motion filed March 17, 1950, strongly insisted that the Administrative Procedure Act of June 11, 1946, 5 U.S.C.A. § 1001, et seq., had not been complied with as to petitioner and urged that under such Act petitioner was entitled to the writ prayed for it should be noted that never prior to March 17, 1950, had petitioner or counsel for petitioner in any way argued or even indicated that said Act was in the slightest degree or at all applicable to the proceedings involving him.

This court notwithstanding the lateness of petitioner's suggestion again carefully examined the entire record, files, exhibits and evidence with respect to whether or not the Administrative Procedure Act related thereto in whole, as claimed by petitioner, or at all.

After such careful consideration and reexamination of every aspect of the matter the court is still of the opinion that the previously announced denial was correct.

Petitioner since such tardy suggestion has argued that all the many hearings held between 1939 and 1945 before the Administrative Procedure Act was ever enacted, as well as long before any effective date of that Act, which as to appointment of Examiner was June 11, 1947, Section 1011, should be set aside because not in compliance with an Act that did not then exist.

Plainly the Act does not apply to the hearings had before its enactment. No hearings were had after it was passed. And it does not appear that the petitioner would have had any rights under the Act as to anything since its enactment that he was not afforded. But even if he would have been entitled to some technical right under the Act after its enactment had he or his counsel timely asked the Immigration authorities for such, he should not now be able to successfully complain.

To approve the position of counsel for petitioner beginning in March, 1950, would establish a precedent hazardous in the extreme.

This Administrative Procedure Act because of the subsequent time of its enactment, because of the subsequent effective date therein stated, and because of the specific language of the Act, did not apply to the proceedings before the Immigration authorities as to this petitioner. Aside from that petitioner, represented all the while by experienced counsel, waived any right to object to the procedure followed.

I can find no basis, either legally or equitably, for the issuance of the writ of habeas corpus sought. Every suggested sentimental ground for granting relief to him is based upon an occurrence happening after the Immigration authorities had declared their opposition to his reentry into the United States and would be a solicitation to others to insincerely copy his course as a helpful strategy.

For the reasons, among others, orally stated by me on December 14, 1949, I am satisfied and find

that the Immigration authorities were acting within the scope of their powers, that they were either arbitrary or capricious nor acting in abuse of their discretion, and that the evidence presented to them was ample to justify the conclusions they reached.

Moreover, based on the record and under the law, I am further satisfied and further find that their actions, findings and conclusions were not contrary to the law or the Constitution; that they were supported by substantial evidence and moreover were supported by the facts to the extent that the facts were or are subject to trial de novo by any reviewing court. And finally I find that there was no prejudicial error. If there were any error on the part of the Immigration authorities such favored petitioner and in no wise constituted prejudicial error. It must be remembered that he wilfully and unlawfully entered the United States early in 1940 and that he is still here and at liberty in spite of the efforts of the Immigration authorities to return him to the country from whence he unlawfully came so many years ago.

His conviction for wilful illegal entry established beyond all reasonable doubt that his entry then was wilful and illegal.

Such is *res judicata* between the government and the petitioner. Having come to this country wilfully and unlawfully over ten years ago he has therefore never since had a lawful right to remain here. I have no legal or conscientious ground to interfere with the decision of the Immigration authorities that he should be deported.

Neither the recent Supreme Court decision of *Wong Yang Sung v. McGrath*, 339 U.S. 33, *supra*, and 339 U.S. 908 *per curiam* modification, nor the *per curiam* decision of April 24, 1950, in the cause of *Yanish, et al., v. Barber, etc.* (9 Cir.), 181 F. 2d 492, apply to petitioner's situation under the record here involved.

The distinctions between them and the instant case are definite and clear. In each of them, contrasted with the situation here, the hearings before the Immigration authorities in question were long after the effective date of the Administrative Procedure Act. In each of them, contrasted with the situation here, the one sought to be deported made timely and appropriate demand for compliance with the Act. See *Wong Yang Sung* cases, 80 F. Supp. 235 and 174 F. 2d 158, and Judge Harris' opinion in the *Yanish* case, 81 F. Supp. 499, and 86 F. Supp. 461 (*Yanish* case—Judge Erskine) for matters preceding the decision of Judge Harris. And in each of them, contrasted with the situation here, there was apparently lawful entry.

Such motion is overruled and such petition of William Ewald Anderson is, of course, again denied.

The foregoing transcript of oral opinion herein of June 22, 1950, is approved.

June 23, 1950.

/s/ LLOYD L. BLACK,
U. S. District Judge.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having heretofore come before the undersigned Judge of the above-entitled Court, sitting without a jury, upon the Amended Petition of William Ewald Anderson for a Writ of Habeas Corpus, upon an order to show cause directed to the District Director of Immigration (R. P. Bonham, now retired, and John P. Boyd having subsequently been duly and regularly substituted by appropriate order) and the petitioner having appeared in person and having been represented by his attorney, Edwards E. Merges, and the respondent Director of Immigration having been represented by J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and each party having introduced evidence and submitted briefs, and the matter having been argued at length, and the Court having taken the same under advisement, and having by oral decision denied the petitioner's petition for a Writ of Habeas Corpus, and thereafter Findings of Fact and Conclusions of Law having been presented for entry, and the Court having taken the signing of said Findings of Fact and Conclusions of Law under consideration for certain proposed changes, and while said Findings of Fact and Conclusions of Law were under consideration, the petitioner having, on March 17, 1950, after the decision of

February 20, 1950, of the United States Supreme Court in the case of Wong Yang Sung v. McGrath, 339 U.S. 33, filed a motion asking the Court for a reconsideration of the entire record and for the granting of the Writ of Habeas Corpus, notwithstanding such oral decision of the Court, and respective counsel having been thereupon accorded a full opportunity to argue the entire matter again and such argument having been had, and the Court having again considered the entire record, and again rendered an oral decision on June 22, 1950, denying the Writ of Habeas Corpus as prayed for, does now make and enter the following:

Findings of Fact

I.

That the petitioner was born in Grand Marais County, Michigan, on August 16, 1902, and lived with his parents in the State of Montana until 1915, at which time his mother and father separated and he accompanied his mother to British Columbia where he lived until 1920. That in 1920 he returned to the United States, and lived with his father until 1922, when he again returned to Canada and remained until 1935. That while in Canada in 1926 he took out naturalization papers as a Canadian citizen in British Columbia in order to engage in fishing in Canadian waters. That he was married to his first wife, a Canadian, in Vancouver, B. C., on August 28, 1923, and was divorced from her on March 31, 1939.

II.

That in 1935 the petitioner returned to the State of Washington and went to live in the city of Aberdeen. That from the time of his arrival in 1935 until 1937, he was employed by the Wilson Brothers Lumber Mills, and in August of 1937, he became Secretary-Treasurer of District Council No. 3 of the International Woodworkers of America, located in Aberdeen.

III.

That petitioner continued as Secretary-Treasurer of the Union in Aberdeen until December of 1938 when he became a delegate to represent his district at the Union at a convention session in British Columbia. That he went to British Columbia as a delegate to said convention, and on January 2, 1939, at the conclusion of the convention started back to the United States on a bus from Vancouver, British Columbia. That he was detained at the border by Immigration Officers and was given a hearing before a Board of Special Inquiry at Blaine, Washington. That the Board of Special Inquiry excluded the petitioner from the United States on the ground that he was an immigrant, not in possession of an unexpired Immigration visa, and he was a person likely to become a public charge, and that he was one who had admitted committing a crime involving moral turpitude, to wit, adultery. That this ruling of the Board of Special Inquiry was appealed to the Board of Review in Washington, D. C., during which time the petitioner remained in Canada. That on March 11, 1939, the Board

of Review in Washington, D. C., sustained the excluding decision, upon the ground that petitioner was not in possession of an Immigration Visa, but that the charge of moral turpitude and the charge that he was a person likely to become a public charge was dismissed. That when the petitioner was advised of the decision of the Board of Review he made formal application at the office of the American Consul General in Vancouver, British Columbia, for the issuance of a permanent visa and that hearings were had and petitioner was issued a permanent visa by the Consul on August 8, 1939. He had in the meantime and on July 19, 1939, married his present and second wife, a native born citizen of the United States and the mother of two children.

IV.

That on August 9, 1939, petitioner began to board the train at Vancouver, British Columbia, for the purpose of coming to the United States but was intercepted at the train by Immigration officers and brought before a Board of Special Inquiry at Vancouver, British Columbia. That further hearings were held by the Board of Special Inquiry which lasted for a period of approximately thirty days, or until September 8, 1939, at the conclusion of which hearings the petitioner was excluded from admission to the United States on the ground that he was a member of the Communist party. That petitioner noted an appeal from the excluding decision, and while the appeal was pending he entered the United States on January 3, 1940, wilfully and

unlawfully and without inspection by the Immigration authorities. That petitioner went immediately upon entering the United States, to his home in Aberdeen, Washington, and surrendered himself to the Immigration officers there for inspection. That thereafter and on the 14th day of March, 1942, petitioner was tried and convicted by a jury in the Federal District Court for the Western District of Washington of illegally entering the United States and was sentenced to 11 months, and ordered to pay a fine of \$500.00. That petitioner then served 9 months at the Federal Road Camp at DuPont, Fort Lewis, Washington, and was discharged.

V.

During the time petitioner was confined in the road camp the Board of Immigration Appeals rendered its opinion on the appeal from the Board of Special Inquiry's order, dated September 18, 1942. That the Board of Immigration Appeals held that the petitioner had entered the United States unlawfully, but gave him permission, in its ruling, to apply for suspension of his deportation. That petitioner thereupon filed his petition for suspension of deportation and after his release from the road camp further hearings were had covering the years 1943, 1944, and during which time the petitioner lived in Seattle with his second wife and adopted sons, working on the Seattle waterfront as a marine rigger.

VI.

That on July 25, 1944, the Seattle Immigration

Inspector Gates made "Findings of Fact and Conclusions of Law" proposing that petitioner's application for suspension of deportation be denied, and that Inspector Gates reaffirmed his opinion on May 9, 1945, and on August 24, 1945, the matter was argued before the Board of Immigration Appeals in Washington, D. C. That on the 5th day of January, 1948, A. R. Mackay, Chief, Exclusion and Expulsion Section, Immigration and Naturalization Service, issued a warrant of deportation commanding that petitioner be deported to Canada on the charges and on the grounds set forth in the order of the Board of Immigration Appeals, and that thereafter and on March 12, 1948, petitioner, through his present counsel, made application for stay of deportation on the ground of the petitioner's physical condition was such as would result in the impairment of his health, which application was denied. That thereafter and on May 7, 1948, petitioner requested a reopening of the proceedings to permit petitioner to present additional evidence showing that petitioner had adopted the two minor children of his wife and that his deportation would result in serious economic detriment to them, which application was denied by the Board of Immigration Appeals June 9, 1948.

VII.

That from an examination of all of the evidence and exhibits introduced the Immigration authorities were acting wholly within the scope of their powers, were neither arbitrary nor capricious and that the

evidence before the Immigration authorities was ample and supported by substantial evidence to justify the conclusions reached.

VIII.

That petitioner did not argue the applicability of this "Administrative Procedure Act" at any time before the Immigration Service nor the Department of Justice, and that no hearings were had before Immigration tribunals subsequent to the passage of the "Administrative Procedures Act."

IX.

That the Immigration authorities committed no prejudicial error.

X.

The petitioner having wilfully and unlawfully entered the United States early in 1940 has never since had a lawful right to remain here.

Done in Open Court this 27th day of July, 1950.

/s/ LLOYD L. BLACK,
U. S. District Judge.

From the foregoing Findings of Fact, the Court makes and enters the following:

Conclusions of Law

I.

That the petitioner is not entitled to the relief prayed for and that the application should be denied and the cause dismissed.

II.

That the "Administrative Procedures Act" does not apply to hearings before Immigration tribunals had before its enactment.

III.

That by reason of the fact that petitioner did not ask for any technical right or relief under the "Administrative Procedures Act" after its passage, he is not now in a position to urge the applicability of the Act to his appeal before the Board of Immigration Appeals and under the facts in this case, the "Administrative Procedures Act" does not apply to the petitioner's administrative appeal from proceedings had before passage of the Act.

IV.

The petitioner's conviction for wilful illegal entry is *res judicata* between the government and the petitioner.

V.

Having come to this country wilfully and unlawfully over ten years ago he has never since had a lawful right to remain here.

Done in Open Court this 27th day of July, 1950.

/s/ LLOYD L. BLACK,
U. S. District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. U. S. Attorney.

Approved as to form:

/s/ EDWARDS MERGES,
Attorney for Petitioner.

[Endorsed]: Filed July 27, 1950.

United States District Court, Western District of
Washington, Northern Division

No. 2083

In the Matter of

WILLIAM EWALD ANDERSON for a Writ of
Habeas Corpus

JUDGMENT

This matter having heretofore come before the undersigned Judge of the above-entitled Court, sitting without a jury, upon the Amended Petition of William Ewald Anderson for a Writ of Habeas Corpus, upon an order to show cause directed to the District Director of Immigration (R. P. Bonham, now retired, and John P. Boyd, having subsequently been duly and regularly substituted by appropriate order) and the petitioner having appeared in person and having been represented by his attorney, Edwards E. Merges, and the respondent Director of Immigration having been represented by J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and each party having introduced evidence

and submitted briefs, and the matter having been argued at length, and the Court having taken the same under advisement, and having by oral decision denied the petitioner's petition for a Writ of Habeas Corpus, and thereafter Findings of Fact and Conclusions of Law having been presented for entry, and the Court having taken the signing of said Findings of Fact and Conclusions of Law under consideration for certain proposed changes, and while said Findings of Fact and Conclusions of Law were under consideration, the petitioner having, on March 17, 1950, after the decision of February 20, 1950, of the United States Supreme Court in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, filed a motion asking the Court for a reconsideration of the entire record and for the granting of a Writ of Habeas Corpus, notwithstanding such oral decision of the Court, and respective counsel having been thereupon accorded a full opportunity to argue the entire matter again and such argument having been had, and the Court having again considered the entire record, and again rendered an oral decision on June 22, 1950, denying the Writ of Habeas Corpus as prayed for, and the Court having taken said matter under advisement and having heretofore rendered its oral opinion in the matter, and having made and entered its Findings of Fact and Conclusions of Law in writing, Now, therefore,

It Is Ordered, Adjudged and Decreed that the application for a Writ of Habeas Corpus herein be and the same is hereby denied, and the rule to

show cause heretofore issued herein be and the same is hereby discharged, to all of which petitioner excepts and exceptions are allowed.

Done in Open Court this 27th day of July, 1950.

/s/ LLOYD L. BLACK,
U. S. District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Approved as to form and Presentation waived:

/s/ EDWARDS MERGES,
Attorney for Petitioner.

(Entered in Civil Docket July 28, 1950.)

[Endorsed]: Filed July 27, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the petitioner, William Ewald Anderson, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered herein on the 27th day of July, 1950, and from the Conclusions of Law therein made as particularly specified by the appellant's statement of points on appeal and from each and every other oral decision and ruling made by the

District Court during the trial and pendency of the above-entitled cause.

Dated this 15th day of September, 1950.

/s/ EDWARDS MERGES,
Attorney for Appellant.

Service accepted this 18th day of September, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

COSTS ON APPEAL BOND

Know All Men by These Presents:

That William E. Anderson, as Principal, and General Casualty Company of America, as Surety, are held and firmly bound unto the United States of America, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States for the payment thereof to the benefit of whom it may concern, the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of September, 1950.

The condition of this obligation is such that, Whereas, the above bounden principal is filing in the above entitled and numbered cause an appeal on a

writ of habeas corpus, now, therefore, if the above bounden principal shall pay all costs if the appeal is dismissed or if the judgment is affirmed or all such costs as the appellant court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

/s/ WM. E. ANDERSON,
General Casualty Company of
America,

[Seal] By EDW. O. FEEK,
Attorney-in-fact.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

PETITIONER'S STATEMENT OF
POINTS ON APPEAL

The District Court Erred In:

1. In making its oral decision on November 4, 1949, denying the petitioner's petition for Writ of Habeas Corpus.
2. In reaffirming such oral decision of November 4, 1949, by subsequent oral decision on December 14, 1949.
3. In making its oral decisions of November 4, 1949, and December 14, 1949, without granting counsel for the petitioner an opportunity to present oral argument.

4. In making its oral decision of June 22, 1940, denying the petitioner's motion for reconsideration and reaffirming its prior oral decisions of November 4, 1949, and December 14, 1949.

5. In holding that compliance with the Administrative Procedures Act of June 11, 1946, by the Immigration Authorities, with regard to proceedings taken by them in a petitioner's case after its enactment was and is not required under the holding of the Supreme Court of the United States in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33.

6. In holding that the Immigration Authorities did not abuse their discretion in ordering the petitioner deported and that their decision in so ordering him deported was supported by substantial evidence.

7. In holding that the Court's scope of review in deportation cases was not broadened by the *Wong Yang Sung* case *supra*.

8. In holding that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Yanish, et al. v. Barber, etc.* (9 Cir.) 181 F. 2d 492, was not applicable to the instant case.

9. In making and entering paragraphs I to III, inclusive, of its Conclusions of Law.

10. In making and entering its Judgment herein, denying the petitioner's application for Writ of Habeas Corpus as prayed for and in discharging the petitioner's rule to show cause on July 27, 1950.

Dated this 15th day of September, 1950.

/s/ EDWARDS MERGES,
Attorney for Petitioner.

Service accepted this 18th day of September, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Please transmit to the Clerk of the Court of Appeals for the Ninth Circuit the entire record of proceedings, together with a Transcript of the testimony and proceedings in the above-entitled cause and all exhibits in connection therewith.

Dated at Seattle, Washington, this 15th day of September, 1950.

/s/ EDWARDS MERGES,
Attorney for Appellant.

Service accepted this 18th day of September, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

STIPULATION AND ORDER TRANSFER-
RING EXHIBITS

It Is Hereby Agreed and Stipulated by and between the parties herein through their respective counsel of record, as follows, to-wit:

That the petitioner has filed herein a Notice of Appeal from the judgment of the above-entitled court entered on the 27th day of July, 1950, and has designated the complete record on appeal and that it is necessary to complete the record that the original exhibits introduced by the parties be, by Order of this Court, transferred with the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Accordingly, It Is Agreed and Stipulated between the parties that the attached Order directing that said original exhibits be transferred by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit be entered forthwith and without notice.

Dated at Seattle, Washington, this 18th day of September, 1950.

/s/ EDWARDS MERGES,
Attorney for Petitioner.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

ORDER

Pursuant to the attached Stipulation, It Is Ordered that all original exhibits introduced by either of the parties, or both, be transferred by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit as a part of the transcript on appeal.

Done in Open Court this 15th day of September, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Approved as to form and entry and Notice of Presentation waived.

/s/ EDWARDS MERGES,
Attorney for Petitioner.

[Endorsed]: Filed September 18, 1950.

In the District Court of the United States for the
Western District of Washington Northern Division

No. 2083

In the Matter of

The Petition of WILLIAM EWALD ANDERSON
for Writ of Habeas Corpus

July 19, 1949

Black, J.

Appearances:

EDWARDS E. MERGES,

Attorney-at-Law, for and on Behalf of
Petitioner.

JOHN E. BELCHER,

Assistant United States Attorney, for and
on Behalf of Respondent.

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

The Court: In the Matter of William Ewald Anderson, Petitioner, versus R. P. Bonham, District Director, Immigration and Naturalization Service, Respondent, are the parties ready?

Mr. Merges: Your Honor, I came straight here this morning from my home and very carelessly neglected to bring a written stipulation to change the name of R. P. Bonham to John P. Boyd as District Director.

However, I would like to move at this time to make that change, and a minute entry may be made, and I will present a written order later today.

The Court: Will you do it today?

Mr. Merges: Yes.

The Court: Is it satisfactory?

Mr. Belcher: Yes, your Honor. [2*]

The Court: The motion for substitution is granted with written order to be presented today. Is Mr. William Ewald Anderson personally present?

Mr. Merges: Yes. Now, Your Honor, the record covers a period of approximately ten years. It is exceedingly involved, and I feel it would assist the Court a great deal if I could rather briefly go through the history of this case with the witness because it will save the Court a lot of time in digging out the facts.

The Court: You may proceed.

WILLIAM EWALD ANDERSON

Produced as a witness in his own behalf as petitioner, being first duly sworn, testified on oath as follows:

Direct Examination

By Mr. Merges:

Q. State your name to the Court.

A. William Ewald Anderson.

Q. You are the petitioner in this case?

A. I am.

Q. And in what country were you born?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of William Ewald Anderson.)

A. I was born in the United States, in Grand Marais, Michigan.

Q. How long did you live there? [3]

A. Just about a year, and my folks moved to the State of Montana.

Q. Where did you live in Montana?

A. A little town out of Missoula called Bonner.

Q. How long did you live in Montana?

A. I lived there until 1915.

Q. Until 1915? A. Yes.

Q. At that time what happened between your parents?

A. Well, my father and mother were separated, and my mother was remarried again.

Q. Where did she go to live?

A. They went to Canada.

Q. What part of Canada?

A. Vancouver, B.C.

Q. Where did your father stay?

A. My father stayed in Montana, in Milltown, Montana.

Q. Did you accompany your mother to Canada?

A. Yes, I went and lived with her up there in Vancouver.

Q. And that was in 1915? A. Yes.

Q. You were approximately 12 or 13 at the time?

A. I was 13 years old, yes.

Q. Did you live in the city of Vancouver with your mother?

A. Yes, I lived,—not Vancouver, but we lived in a little [4] town just out of Vancouver.

(Testimony of William Ewald Anderson.)

Q. Had you attended school in this country prior to going to Vancouver?

A. In Milltown, Montana.

Q. What grade of school were you in prior to going to Vancouver?

A. Seventh grade, if I recall correctly.

Q. What did you do in Canada?

A. When I finished school at an early age I went to work, when I was about fourteen or fifteen.

Q. When you finished school. Was that high school or grammar?

A. No, preliminary school.

Q. Is that grammar school? A. Yes.

Q. Did you go to high school? A. No.

Q. How old were you when you finished going to the school that you went to?

A. Oh, I was about fifteen.

Q. About fifteen. And you began working in Canada then?

A. Yes, I worked there for a while.

Q. Where did you work?

A. At this little town outside of Vancouver, B.C.

Q. What kind of work did you do? [5]

A. I worked in a hardware store.

Q. Were you affiliated with any labor organizations at that time?

A. No, none whatsoever.

Q. How long did you work in the hardware store?

A. Well, probably a year and a half, I would say.

Q. Did you return to the United States in 1920?

A. I did, yes.

(Testimony of William Ewald Anderson.)

Q. Why did you return to the United States?

A. My father had moved to Aloha, Washington, and he requested that I come down with him, and I did according to his request.

Q. What did you do when you were in the United States?

A. I worked in a sawmill in Aloha, Washington.

Q. What part of the state is that?

A. In the southwestern part of Washington, south of Hoquiam.

Q. That is down in the Hoquiam-Aberdeen district, is that right?

A. Grays Harbor County.

Q. What did you do in the sawmill?

A. I worked as a tail grader on the green chain.

Q. How long did you work in the sawmill?

A. I worked there, I would say, around six or seven months, and the plant burned down. [6]

Q. What did you do then?

A. We moved to Hoquiam, me and my father. I moved and went to Hoquiam.

Q. Did you live with him alone, or was he remarried? A. He never did remarry.

Q. And you just lived with your father?

A. Yes, that is right.

Q. How long did you live in Hoquiam with your father?

A. We stayed there several months. Then we went back to Milltown, Montana.

Q. By that time you were getting up to almost twenty-one years of age?

A. Yes, I was getting up around there.

(Testimony of William Ewald Anderson.)

Q. Were you affiliated with any organization at that time? A. No, I never was.

Q. No labor unions?

A. No, no unions or anything of the kind.

Q. What did you do, if anything, in 1922 with reference to leaving the United States?

A. I went back to Canada then in 1922.

Q. Why did you go back to Canada?

A. My mother was up there, and I went up to pay a visit to her.

Q. Had you ever in any manner renounced your American citizenship up to that time? [7]

A. No, I had not.

Q. What did you do when you returned to Canada in 1922? A. I stayed there until——

Q. 1935? A. 1935, yes.

Q. What did you do from 1922 to 1935?

A. Well, I worked in the logging camps up there, and I worked in the sawmills, and in 1926 I went fishing,—commercial fishing.

Q. Commercial fishing? A. Yes.

Q. Salmon fishing? A. Yes.

Q. Did you go on a troller or gill-netter?

A. I went on a gill-netter.

Q. That was a gill-netter of Canadian registry?

A. Yes, it was a Canadian registered boat.

Q. Where did it go out of?

A. It went out of Malcomb Island.

Q. Malcomb Island? A. Yes.

Q. Now, when you got that job, did you have to do anything with reference to naturalization papers?

(Testimony of William Ewald Anderson.)

A. In order to fish in Canadian waters it was necessary to have Canadian papers. [8]

Q. You could not get a license to fish in Canadian waters unless you were a Canadian?

A. No. I therefore took out Canadian papers.

Q. When did you apply for Canadian papers, to the best of your knowledge?

A. Well, I knew I was going fishing, and I would say probably May, 1926, if I recall correctly.

Q. May, 1926?

A. I think it was around that time.

Q. And do they have preliminary and final papers there, or what is the system, if you know?

A. It is just the final papers. There isn't first and second papers; it is just the final.

Q. And when did you get your final papers?

A. I don't recall the date, but it was not very long. It was probably 60 days after I was in court.

Q. Did you have any other reason for taking out Canadian naturalization papers?

A. No, not at that time.

Q. Were you skilled in any trade so that you could make your living by other means than common labor at that time?

A. No, I was not.

Q. What did you do then after you took out your Canadian naturalization papers? Did you continue to reside in [9] Canada?

A. Yes, I stayed there until 1935.

Q. What did you do with reference to earning your living from 1926 to 1935? Would you just give us a brief resume of the work that you did?

(Testimony of William Ewald Anderson.)

A. Yes, I done common labor work. Work was quite scarce at that time, and I done odd jobs of all kinds.

Q. How long did you fish?

A. I just fished that one sockeye season.

Q. What did you do after that?

A. I went to work in a logging camp.

Q. What did you do in the logging camp?

A. I was a loader in a logging camp.

Q. Loader? A. Yes.

Q. Did you work in logging camps from 1927 to 1935?

A. Most of the time was spent in logging camps and in sawmills. I worked in a sawmill quite a long time right in Vancouver.

Q. That has been more or less your trade, I take it? A. Yes, the lumber industry.

Q. What did you do in 1935?

A. Well, I came to the United States in 1935.

Q. Where did you live in the United States?

A. Aberdeen, Washington. [10]

Q. Through what port did you enter the United States from Canada? A. Blaine, Washington.

Q. Did you pass through the Immigration there?

A. Yes.

Q. You were admitted by the Immigration, I take it? A. Yes.

Q. What did you begin to do when you returned to Aberdeen in 1935?

A. I went to work in the lumber industry and sawmills.

(Testimony of William Ewald Anderson.)

Q. Was your father there then?

A. Yes, my father was in Aberdeen.

Q. Did you live with your father in 1935?

A. I lived with my brother for a while, and then me and my father moved in, and we lived together.

Q. By what lumber mill were you employed in 1935? A. Wilson Brothers Lumber Mill.

Q. Were you employed there from 1935?

A. Yes, I was in a store, and I worked in their mill, too, in between.

Q. By that time you were getting up to be approximately 35 years old?

A. I would say that, yes.

Q. And in 1937 did you make any change in your manner of earning a living? [11]

A. Well, I was elected to an office in the union there, the International Woodworkers of America.

Q. The International Woodworkers of America?

A. Yes.

Q. Did you have any other affiliation besides the International Woodworkers of America?

A. Well, we were in the American Federation of Labor at that time, and we just disaffiliated.

Q. You mean by that the International Woodworkers of America was a unit of the American Federation of Labor?

A. Yes, it was called the Federation of Woodworkers, and when we disaffiliated, we changed the name to the International Woodworkers of America.

Q. And as I understand your testimony, in August, 1937, you became an officer of that union?

(Testimony of William Ewald Anderson.)

A. That is correct.

Q. How did you gain your position as an officer of that union?

A. I was working in the mill, and the mill was about 14 miles from Aberdeen. They had monthly meetings, and I was selected as a shop steward in the Wilson Mills there, and from there I was elected to higher office.

Q. Were you a member of any political party or organization [12] at that time?

A. I was not.

Q. Was your only affiliation that affiliation with International Woodworkers of America?

A. That is right.

Q. When you became an officer of that union did you have any particular support from any political organization——

A. No.

Q. —— when you ran for election? A. No.

Q. Approximately how many members were there in the union that elected you?

A. At that time there was between ten and twelve thousand.

Q. Between ten and twelve thousand?

A. Yes.

Q. And that covered a district down in that country, is that right?

A. Yes, that was southwestern Washington.

Q. Will you tell the Court what territory that district included?

A. That covered about ten logging centers in the southwest.

(Testimony of William Ewald Anderson.)

Q. Briefly, what territory?

A. Aberdeen, Raymond, Centralia, Chehalis, Shelton, [13] Hoquiam, Copalis, Ryderwood and Bucoda.

Q. After your election in August, 1937, did you devote your exclusive time to your duties as an officer in the union? A. Exclusively, yes.

Q. You did not engage in any work in the saw-mill, I take it, after that?

A. No, I was a paid, full-time officer.

Q. Will you tell the Court briefly what your duties were as an officer in the union?

A. I was elected Secretary-Treasurer, and I had charge of the district finances of the 12 affiliated local unions at that time and a record and a chart of the membership of the entire district composing the 12 local unions; and my duties were to keep in close contact with the 12 locals.

Q. Did that necessitate your traveling around from local to local?

A. Yes, I used to travel approximately 35 to 40,000 miles a year.

Q. Did it necessitate any organizational activity on your part?

A. Yes, definitely, that was one of my responsibilities.

Q. Getting members, you mean?

A. Yes. [14]

Q. Were you affiliated with any organization during the period 1937-1938 other than the International Woodworkers of America? A. No.

(Testimony of William Ewald Anderson.)

Q. How often did you come up for election?

A. Every year; once a year.

Q. Were you reelected the subsequent year?

A. Yes.

Q. Was it necessary for you to attend different meetings in the course of your work? A. Yes.

Q. Why?

A. I had to attend, I would say, on the average of 16 or 17 meetings a week of my different locals and different committee meetings and so forth.

Q. Was there a good deal of political activity in that district at that time? A. Yes, there was.

Q. In December of 1938 did you have occasion to leave Aberdeen? A. Yes, I did.

Q. And, by the way, during this time did you ever conceal your identity in any manner from the Immigration or anybody?

A. No, none whatsoever. [15]

Q. Is your true name William Ewald Anderson?

A. Yes.

Q. Did you ever go under any other name?

A. I had the name of Wynno Ewald Anderson, but I never used that name. I have always been called William, and I eventually had that Wynno stricken by the probate court. I had it changed in probate court to read William Ewald Anderson.

Q. Why did you have it stricken? Because there was some implication concerning the war?

A. Yes, and I did not like the sound of it at all.

Q. But your last name is Anderson?

A. Correct.

(Testimony of William Ewald Anderson.)

Q. And you have never changed it? A. No.

Q. Have you ever gone under any other name?

A. No, sir.

Q. In December of 1938 did you go to Canada?

A. Yes, I did.

Q. Why did you go to Canada?

A. I was elected as a delegate to attend a convention of our Canadian organization in Vancouver, B. C.

Q. By "our Canadian organization" you mean what organization?

A. A district of the International Woodworkers of [16] America, District No. 1.

Q. Through what port did you pass when you went to Canada? A. I went through Blaine.

Q. Did you pass through Immigration at Blaine?

A. Yes.

Q. Did you give to Immigration your true and correct name? A. Oh, definitely.

Q. When you got up to British Columbia, how long did you stay?

A. I returned the next day.

Q. What did you do in British Columbia with reference to labor activities?

A. You mean during my visit there?

Q. When you went up there for the convention?

A. I just went to one session of the convention and returned the next day.

Q. Did you go up there to Canada for any other purpose than to attend the convention?

A. That was the purpose we went up for.

(Testimony of William Ewald Anderson.)

Q. And the next day was approximately in January of 1939, is that correct? A. Yes.

Q. The first or second of January, 1939?

A. Yes. [17]

The Court: What did you say the next day was?

Mr. Merges: Approximately the first or second of January, 1939.

The Court: He went up in December, 1938?

Mr. Merges: Yes.

Q. The latter part of December, was it not?

A. I think it was the first or second day of January, 1939, that I went up there.

Q. That you went up there? A. Yes.

Q. And you only stayed there for one day?

A. Yes, that is right.

Q. And by what mode of transportation did you start back? A. On the stage.

Q. Where were you going?

A. I was coming back to Aberdeen to my responsibilities there.

Q. And when you got to the border, what happened?

A. Well, the Immigration called me off, and they had a Special Board of Inquiry there for me.

Q. At the border at Blaine?

A. That is right.

Q. Did they take you off the bus? [18]

A. Yes.

Q. And when they took you off the bus did you give them your true and correct name?

A. Yes, I did.

(Testimony of William Ewald Anderson.)

Q. And where did they have the hearing of the Board of Special Inquiry?

A. Right in the office of the United States Immigration at Blaine.

Q. How long did that hearing last?

A. Oh, just a little better than half an hour.

Q. And what was the result of the hearing?

A. I was denied the right to enter the United States because I was not in possession of an unexpired Immigration visa and that I might become a public charge, and for a crime involving moral turpitude.

Q. Did you after your exclusion by the Board of Special Inquiry then return to Vancouver?

A. Yes, I returned to Vancouver.

Q. Did you appeal the order of the Board of Special Inquiry?

A. I did. That was my first duty when I got back to Vancouver.

Q. And did the Board of Review in Washington, D. C., make a ruling on that appeal?

A. Yes, there was a decision handed down. [19]

Q. Was that acted upon approximately March 11, 1939?

A. Yes, around that time.

Mr. Merges: Now, if your Honor please, that decision of the Board of Review in Washington is found in Part 1 of the record, and is referred to on page 3 of my brief. I have quoted an excerpt from that opinion on page 3 of my brief, and it is in Part 1 of the record.

The Court: Very well.

(Testimony of William Ewald Anderson.)

Q. (By Mr. Merges): Now, this opinion came down approximately March 11, 1939?

A. I would say just around that date.

Q. Around that date. Did you live in Vancouver, B. C., from the time you were denied admission to the United States in January of 1939 until the decision came down from the Board of Review in March, 1939?

A. I never left Vancouver.

Q. You resided continuously in Vancouver, and I suppose the decision of the Board of Review was brought to your attention?

A. Yes, it was.

Q. Briefly, was it your understanding of the decision of the Board of Review that the Board of Special Inquiry was not sustained in its holding that you were likely to become a public charge and that you were guilty of [20] a crime involving moral turpitude?

A. That is right.

Q. You were excluded solely on the ground that you did not have an Immigration visa, is that correct?

A. That is correct.

Q. The other grounds for exclusion by the Board having been dismissed, is that correct?

A. Yes.

Q. And it was also your understanding that you were specifically granted by the Board of Review permission to apply for a visa to the American Consul, is that right?

A. That is right.

Q. And understanding that, what did you do?

A. Upon receipt of the communication from the Board of Review, I proceeded to apply for an Im-

(Testimony of William Ewald Anderson.)

migration visa from the American Consul in Vancouver.

Q. Approximately when did you make that application, do you remember?

A. It was very soon after receiving the decision from the Board of Review.

Q. Probably some time in March of 1939?

A. Yes, I would say it was around that time.

Q. When you made that application, what did it entail? Will you tell us briefly? [21]

A. I made the application to Mr. Joslyn, and I was granted—it went through considerable hearings.

Q. Now, by “hearings” what do you mean? Do you mean they asked a lot of questions?

A. Yes, I was questioned at considerable length.

Q. How many different hearings, if you recall?

A. Oh, I would say probably half a dozen hearings.

Q. Did you produce any witnesses at the hearings?

A. I don't think I did because I did not have any witnesses up there in Canada, you see.

Q. You just testified yourself?

A. Yes, outside of communications that was sent in my behalf.

Q. Was the Immigration advised that the American Consul was conducting these hearings, or do you know? A. I beg your pardon.

Q. Was the Immigration, American Immigra-

(Testimony of William Ewald Anderson.)

tion, in Vancouver advised that the American Consul was conducting these hearings?

A. Yes, I suppose they were.

Q. And the purpose of the hearings was to determine whether or not you were entitled to a permanent visa to enter the United States, is that correct?

A. That is right.

Q. Were you issued a permanent visa by the American [22] Consul?

A. I was on August 8th.

Q. 1939? A. Yes.

Q. And during that time you had not left Vancouver? I mean from January, 1938—January, 1939, to August, 1939?

A. That is right.

Q. What did you do when you were issued the permanent visa on or about August 8, 1939?

A. Well, the same day or the day after I got my belongings together and went down to the train to re-enter the United States after Mr. Joslyn told me I was entitled to travel back home again.

Q. He told you you were entitled to enter the United States?

A. Yes.

Q. Did he give you any kind of a document?

A. Yes, I received a permanent visa.

Q. The document was labeled "permanent visa" was it?

A. Yes.

Q. So on the next day, on or about August 9, you boarded the train?

A. That is right.

Q. And the destination was where? [23]

A. Seattle, Washington.

(Testimony of William Ewald Anderson.)

Q. Seattle, Washington. Why Seattle rather than Aberdeen?

A. My wife happened to be here at the time. She was staying with her parents, and, of course, I was going to Aberdeen from there.

Q. I beg your pardon?

A. I was going to go to Aberdeen from Seattle.

Q. Did the train stop at the border, or did you get as far as the border?

A. No, I didn't even leave Vancouver.

Q. What happened?

A. The Immigration officer stopped me and told me he would like to see me at the Immigration office for routine questioning, and asked me to meet him down there the next day, I think it was.

Q. The next day?

A. Yes, I think it was the next day.

Q. So I take it that you abandoned—at least, you got off the train or you didn't get on the train?

A. That is right. I was just ready to get on.

Q. Did this occur right at the station?

A. I was right where you catch the train on the platform.

Q. Did you have your bags with you?

A. Yes, I did. [24]

Q. And this man came up and tapped you on the shoulder?

A. That is correct.

Q. Did you inform him of your name?

A. Yes.

Q. Did you show him your visa?

A. Yes.

Q. What did you do then?

(Testimony of William Ewald Anderson.)

The Court: Just a moment. We will have a short recess of this matter.

(Recess.)

Q. (By Mr. Merges): Now, you were removed from the train by Immigration authorities on or about August 10, 1939, or prevented from getting on the train? A. Yes, that is right.

Q. And in response to the request of the Immigration, did you report the following day at the United States Immigration headquarters in Vancouver? A. I did.

Q. And what occurred there?

A. A series of hearings commenced which lasted until around September 6th or thereabouts.

Q. How many hearings did they have from August 9 to September 8th?

A. I don't remember the exact number, but there was quite a number of hearings held there. I could not say [25] the definite number, but they were held pretty regularly.

Q. Were you represented by an attorney?

A. No, I was not.

Q. Did you request the Immigration authorities to permit you to have an attorney? A. Yes.

Q. What did they tell you?

A. They claimed I was not allowed the right to be represented by an attorney.

Q. Did you have any witnesses testify in your behalf? A. No, I did not.

Q. Did they have any witnesses testify against you? A. No.

(Testimony of William Ewald Anderson.)

Q. Do you know whether they had any witnesses or any evidence that was introduced in your absence?

A. Yes, they had ex parte statements from three members of our union that was presented at them hearings.

Q. Were you permitted to confront these people who gave the statements and cross-examine them yourself? A. No.

Q. Were you advised of their introduction at that time? A. I think I was.

Q. And you say these hearings lasted from August 9 to September 8th. What happened upon the conclusion of [26] the hearings on September 8th, 1939?

A. Their decision was that I was denied the right to enter the United States because I was a member of an organization that was out to overthrow the United States government by force and violence.

Q. And the three witnesses who gave statements against you to the Immigration at that time were named what?

A. Clark, Deskins, and Vekich.

Q. Vekich is spelled V-e-k-i-c-h?

A. Right.

Q. Clark, Vekich and Deskins. I believe you were not permitted to confront any of these three men? A. That is correct.

Q. And you were excluded on the ground that

(Testimony of William Ewald Anderson.)

you were a member or were affiliated with the Communist Party, is that correct?

A. That is correct.

Q. Were you so advised? A. Yes.

Q. Did you appeal from that decision?

A. I did.

Q. When did you appeal?

A. Just as soon as their decision was handed down we proceeded to prepare the brief for an appeal.

Q. You say "we." Who do you mean by "we"?

A. Well, the attorney that was representing me up there.

Q. Did you get yourself an attorney then?

A. That was the man that was the union attorney up there, yes.

Q. I suppose he was called a barrister or solicitor? A. Yes.

Q. And did he file on your behalf, then, a brief?

A. Yes, he did.

Q. And as I understand this attorney was not permitted to participate in the hearings, is that right? A. That is right.

Q. And he prepared his brief only from the record that was made when you were not represented by an attorney of your choice?

A. That is right.

Mr. Belcher: If he knows. I don't know how he would.

Mr. Merges: I should not lead the witness, but

(Testimony of William Ewald Anderson.)

I am merely trying to cover it as quickly as possible. If I lead too much, stop me, please.

Q. (By Mr. Merges): Now, while this appeal was pending, did you enter the United States?

A. Yes, I did.

Q. Did you enter the United States on or about January 3, 1940? [28] A. I did.

Q. Had your visa been revoked by the American Consul at the time you entered the United States?

A. No.

The Court: January 3, 1940?

Mr. Merges: January 3, 1940.

Q. Did you pass through the Immigration at Blaine? A. I passed through, yes.

Q. You did not report to the Immigration?

A. That is correct.

Q. You passed through and did not report at the Blaine Immigration? A. Yes.

Q. But your visa had not been revoked?

A. It had not.

Q. Did you report to the Immigration immediately upon your entry into the United States?

A. I did. I proceeded to Aberdeen and reported to the Immigration in Aberdeen.

Q. How long had you been in the United States before you reported to the Immigration at Aberdeen, Washington?

A. That was practically one of my first responsibilities, to report down there, probably next day, or a day or two after. It was very soon after I came in.

(Testimony of William Ewald Anderson.)

Q. And you went to the local Immigration office at [29] Aberdeen, is that right?

A. I did, that is right.

Q. Did you inform them that you had come across the border without reporting to the Immigration at Blaine? A. I did.

Q. Did you surrender yourself to the Immigration? A. I did.

Q. In Aberdeen? A. Yes.

Q. And what did the Immigration authorities do? Did the Immigration authorities confine you?

A. No, they did not.

Q. Did they put you under bond? A. No.

Q. How long did you reside in Aberdeen after your reporting to the immigration on January 3, 1940? A. Until early in 1942.

Q. Until early 1942?

A. Yes, until 1942 some time.

Q. You had been indicted, had you not, for illegal entry? A. That is right.

Q. And did you serve a sentence? A. Yes.

Q. For how long were you sentenced?

A. I was sentenced to eleven months in the Dupont Federal [30] Road Camp.

Q. How many months did you serve?

A. I got off for good behavior, and I think it was around nine or nine and one-half months; something like that.

Q. That you actually served? A. Yes.

Q. What did you do after you were released from the Road Camp in Dupont?

(Testimony of William Ewald Anderson.)

A. I was returned to Tacoma and then to Seattle, and I was released to my wife, and immediately, as soon as I was out, I went to work.

Q. And what kind of work did you begin?

A. I went to work on the waterfront as a marine rigger.

Q. In Seattle? A. Yes.

Q. Now, did you leave the United States at all from the time you came in in 1940, in January?

A. No.

Q. Did you live in Seattle thereafter?

A. Yes.

Q. Were you affiliated with any organization—any labor organization or political organization at that time?

A. Yes, I belonged to the Boilermakers Union after I [31] went to work as a marine rigger.

Q. Were you a member of any political party or organization up until that time other than the International Woodworkers Union and the Boilermakers Union? A. That is right.

Q. I asked you the question, were you. For the purpose of the record you must answer responsively.

A. Them are the two organizations I belonged to.

Q. Did you belong to any others? A. No.

Q. Now, while you were in the road camp, your appeal from the decision of the Immigration in Vancouver was pending, was it not?

A. That is right.

(Testimony of William Ewald Anderson.)

Q. And while you were in the road camp the Board of Immigration Appeals handed down a decision, did it not? A. That is correct.

Mr. Merges: That decision, if your Honor please, is found in File No. 2. I quote from that decision on page 5 of my trial memorandum.

Q. Now, the substance of the decision of the Board of Immigration Appeals rendered on your appeal was that you were given permission to apply for suspension of your deportation, is that correct?

A. Yes. [32]

Q. And pursuant to that decision, which was rendered on September 18, 1942, did you then make application to the Immigration authorities for suspension of your deportation? A. I did.

Q. Did the Board of Review hold according to your understanding that your not being permitted to confront your accusers, your hearing was not an adequate hearing? A. That is correct.

Q. So then you employed an attorney in Seattle to represent you on your application for stay of deportation? A. Yes, I did.

Q. And did they have hearings on that?

A. Yes, there was numerous hearings commencing from 1943 until 1944, I believe.

Q. You had a number of hearings, then, from 1943 to 1944 on your application for stay of deportation? A. Yes.

Q. And at those hearings you were represented by counsel? A. Yes.

Q. Did the Immigration produce the three wit-

(Testimony of William Ewald Anderson.)

nesses, namely, Clark Vekich and Deskins, who had testified against you previously?

A. No, there was just one witness presented there, and [33] that was Deskins.

Q. That was Deskins? A. Yes.

Q. Was your counsel permitted to examine Deskins? A. Yes.

Mr. Merges: I would like to call the Court's attention to page 6 of my brief, in which I quoted a portion of the testimony of the witness Deskins.

Q. Were you there when Deskins testified?

A. Yes.

Q. Did he in substance recant his prior testimony that you were affiliated with the Communist Party?

A. He did.

Q. Did the Immigration authorities produce the other witnesses? You say they did not produce either Clark or Vekich? A. That is right.

Q. Did they produce any other witnesses who testified against you?

A. Yes, they produced five more witnesses.

Q. And they testified during these series of hearings that were held in 1943 and 1944?

A. Yes.

Q. Were you permitted to confront them? [34]

A. Yes, my attorney was permitted to examine them.

Q. And your attorney examined each of these five new witnesses who were produced by the Immigration? A. Yes.

Mr. Merges: The summary of the testimony of

(Testimony of William Ewald Anderson.)

these five new witnesses appears on pages 7, 8, 9, 10 and 11 of my trial memorandum.

Q. Did any of these witnesses testify of their own personal knowledge that you were a member of or affiliated with the Communist Party in your presence? A. No.

Q. Were some of these witnesses members of the union? A. Yes.

Q. Was there any friction between the members and officers of the Union during the period that you were an officer?

A. Yes, there was quite a heated battle going on in the organization.

Q. The union was divided into two different warring camps?

A. Probably three some times.

Q. Probably three. And you represented one, and various other people represented the others, is that correct? A. Yes.

Q. Had any of these witnesses who testified against you been members of other factions in the union? A. Yes. [35]

Q. Which ones?

A. Well, they belonged to the faction that was opposed to me.

Q. Why were they opposed to you?

A. Well, they probably thought I was not doing the proper thing or not according to what they thought was their idea of running the union.

Q. Name the five witnesses who testified against you in the 1943 and 1944 hearings?

(Testimony of William Ewald Anderson.)

A. One was——

The Court: Does the record show them?

Mr. Merges: Yes.

A. ——Villas Lant, John Gillespie, Ward Penning, D. Shanley, and Art Davenport.

Q. Did the Government produce any other witnesses than the witnesses you have named?

A. No.

Q. Did you produce any witnesses on your behalf?
A. I did.

Q. Will you name the witnesses who testified in your behalf, if you know?

A. Frank L. Morgan.

Q. What was his business at that time?

A. He was State senator and attorney.

Q. Who else? [36]

A. Ray De Krazy, attorney; Charles Savage, State representative; Harvey Nelson, who was a logger; Clarence Williams; William McDonald; Denee Dyer; Ted Dokter. I can't recall any others now.

Q. On July 25, 1944, did the Immigration conclude their hearings—on or about July 25, 1944?

A. Yes.

Q. Did they make a finding that you were a member of or affiliated with the Communist Party?

A. That was their decision.

Q. And after reopening, this decision was reaffirmed on May 9, 1945, is that correct?

A. Yes.

The Court: When was this?

(Testimony of William Ewald Anderson.)

Mr. Merges May 9, 1945.

The Court: After reopening?

Mr. Merges: Yes.

The Court: Reaffirmed.

Q. Was this matter argued before the Board of Immigration Appeals on August 24, 1945?

A. Yes, it was.

Mr. Merges: Does your Honor have a question?

The Court: No.

Mr. Merges: On August 24, 1945, it was argued before the Board of Immigration Appeals. [37]

Q. Now, during this time while these hearings were going on in 1943 and 1944, where did you live?

A. I lived in my home in Seattle.

Q. With your wife?

A. Yes, wife and two boys.

Q. Is your wife an American citizen?

A. Yes, she was born in Othello, Washington.

Q. And the two boys are American citizens?

A. Yes.

Q. They are her children by a prior marriage, I take it? A. That is right.

Q. Did you adopt these children? A. Yes.

Q. Now, what action did the Immigration take on your case after the matter was argued to the Board of Immigration Appeals on August 24, 1945? Did they take any action on it in 1946?

A. No.

Q. Did you continue to live in Seattle in 1946?

A. Yes.

Q. Did they take any action in 1947?

(Testimony of William Ewald Anderson.)

A. No.

Q. And what happened in 1948?

A. I believe the decision was handed down, and I was——

Q. In 1948? [38]

A. Yes, and I was ordered deported.

Q. Did you live in Seattle all during that time?

A. Continuously, yes.

Q. What business were you in? Were you still working on the waterfront?

A. No, I am barbering. I have my own barber business.

Q. When did you start barbering?

A. In 1946.

Q. Where is your barber shop?

A. 503 West 65th.

Q. Do you employ any other barbers?

A. Yes, I have a part-time employee.

Q. Then in 1948 the opinion of the Board of Immigration Appeals was handed down, is that correct? A. Yes.

Q. And that opinion held that you were affiliated with or a member of the Communist Party?

A. Yes.

Q. And you were ordered deported?

A. That is right.

Q. Did you then make application for stay of deportation? A. Yes, I did.

Q. And that application was refused, was it not?

A. I think it was, yes.

(Testimony of William Ewald Anderson.)

Q. On the ground that you were not eligible for suspension [39] because of the fact that there had been a finding that you were a member of or affiliated with the Communist Party? A. Yes.

Q. And thereafter you brought this proceeding, is that correct? A. That is correct.

Q. Are you still living with your wife?

A. Yes.

Q. And the boys living with you?

A. Yes, they are.

Q. How old are the boys now?

A. One is 17. The youngest is 17 and will be 18 this coming week. The oldest is 19.

Q. Have they been going to school?

A. Yes.

Q. Are they in school now?

A. Yes, they are on vacation now. One of the boys, the youngest, goes to Ballard High. He is on vacation. The other boy is also taking some time off.

Q. You have been supporting the boys?

A. I have.

Q. And your wife has been working part-time?

A. Yes, she has been working.

Q. Do your boys wish to continue their education? [40] A. Yes.

Q. And are you willing to support them and put them through school?

A. Yes, you bet I am.

Mr. Marges: I invite your Honor's attention to the affidavits of the two boys found in Part 6 of the record.

(Testimony of William Ewald Anderson.)

Q. At these various meetings that you attended, union meetings, were there Communists present?

A. I presume there were, yes.

Q. There were quite a few Communists down in that country at that time, as a matter of fact, were there not? A. Yes.

Q. Were you ever affiliated with any of the members of the Communist Party—working with them in any way?

A. Oh, I would not say “working with them,” no. Probably members of the union—there were probably Communists in the union, if that is what you mean.

Q. You mean by reason of your duties in the union you had occasion to work probably with some people who were Communists? A. Yes.

Q. Did you ever do any work for the Communist Party? A. No.

Q. Did you ever distribute any literature for the [41] Communist Party?

A. I never did.

Q. What was the purpose of the meetings that you went to in Aberdeen?

A. It was mainly and specifically on matters pertaining to the union.

Q. I suppose the union discussed the political affairs? A. Yes.

Q. Did you ever attend a Communist meeting?

A. No.

Q. You have, as I understand you to say, at-

(Testimony of William Ewald Anderson.)

tended meetings where a good many Communists were present? A. Oh, yes.

Mr. Merges: That is all.

The Court: It is ten o'clock. We will have a ten-minute recess.

(Recess.)

Q. (By Mr. Merges): You called my attention to a slight mistake you wish to correct in regard to the exact length of time you spent in road camp?

A. Yes, I served an additional 30 days to take care of a fine that was imposed on me.

Q. That was not for any misconduct?

A. No. [42]

Mr. Merges: That is all.

Cross-Examination

By Mr. Belcher:

Q. Mr. Anderson, is this International Woodworkers of America what is commonly known as the I.W.W.? A. No.

Q. Were you in Aberdeen at the time there was such an organization as the I.W.W.?

A. No, I was not in Aberdeen then.

Q. But there were Communists—known to you to be Communists, that were members of the International Woodworkers Union, who attended those meetings?

A. There were several admitted members of the Communist Party, yes.

(Testimony of William Ewald Anderson.)

Q. And isn't it a fact that at those union meetings the Communists who were members took considerably more of an active part than the other members who were not Communists?

A. At certain times they did.

Q. And that condition prevailed in the union of which you were the Secretary?

A. Well, I would not say that. If the inference is that they had the full swing of the union, they did not. [43]

Q. What were the occasions of the 17 meetings a week of your union? Labor disputes?

A. Labor disputes, industrial insurance cases, political welfare meetings, committee meetings on sick cases, and other meetings concerning the union.

Q. Now, in these political welfare meetings that you say you had, did the Communists attend those meetings who were also members of the I.W.W.—I mean the International Woodworkers?

A. Very possibly so.

Q. Do you recall? You were Secretary of the organization at that time, were you not?

A. I was the District Secretary, yes.

Q. Were there any discussions in the union at any time about the activities of the Communists somewhat ruling the association?

A. In the union?

Q. Yes? A. Yes.

Q. Were your meetings recorded?

A. Just longhand minutes taken.

(Testimony of William Ewald Anderson.)

Q. Why did you leave the International Woodworkers of America?

A. Well, after I served my time in Dupont, I came to Seattle, and I thought that if I left the International [44] Woodworkers of America, I probably might get favorable consideration from the Immigration authorities, if I got into another occupation.

Q. Now, were you in dispute with the authorities—

A. You mean of the International Woodworkers?

Q. Yes.

A. Well, there was considerable turmoil at that time.

Q. Now, this function that you attended at Vancouver—how long did it last?

A. Oh, it probably lasted a week. They usually last a week.

Q. You went up there for one special purpose?

A. Yes.

Q. And stayed but one day? A. Yes.

Q. Do you know whether or not the organization in Canada was dominated by Communists?

A. No, I don't know.

Q. What was the particular phase of the union in Canada that you went up to that function about?

A. Well, more or less—when we had our district functions, it was more or less of a conveying of greetings from another district to the district that is having the function, and usually reporting on

(Testimony of William Ewald Anderson.)

conditions and wages and negotiations and so forth.

Q. Were there any discussions had at the meeting that you attended in Canada concerning Communism? A. No.

Q. Now, Mr. Anderson, have you ever been at any time a member of or affiliated with the Communist Party? A. No.

Q. And I take that answer to mean that you are not now—— A. That is correct.

Q. ——a member of or affiliated with the Communist Party? A. That is correct.

Q. Throughout the various hearings that you have had before the Immigration authorities, how many different lawyers have represented you?

A. I would say four; probably five.

Q. Outside of Judge Beeler?

A. Mr. Merges and Mr. Stanton from Vancouver, B. C., and Mr. Frank Morgan represented me, too.

Q. Anybody else?

A. That is all, I am quite sure.

Q. Did Ross Kingston represent you?

A. Yes, that is right; he did.

Q. Who was the attorney for the International Woodworkers in 1940?

A. You mean the parent body?

Q. Yes, either the local or the parent body? [46]

A. The locals had different representation, and the International had its, and the districts had different representation. I think our particular union was represented by the Gershon brothers. I can't

(Testimony of William Ewald Anderson.)

think of the name of the man who was the International's attorney at that time. He represents the Teamsters organization in Los Angeles now. I can't recall his name. He ran for governor of the State.

Q. John C. Stevenson?

A. That is correct, yes.

Q. Now, you know that a permanent visa such as was granted to you by the Consul at Vancouver of itself did not entitle you to enter the United States, didn't you?

A. Mr. Joslyn told me that there was only one in 10,000 that didn't get back into the United States in possession of a permanent visa.

Q. You knew, did you not, that in addition to the visa you must be otherwise qualified?

A. I didn't hear the question.

Q. You have to be otherwise qualified to cross the border?

A. Yes, I presume you do.

Q. Why did you not go to the Immigration station and report at the time you say you crossed the border on foot? [47]

A. Well, I thought that by reporting in Aberdeen and promptly reporting there, that it would be all right.

Q. In other words, you were going to get into the United States whether or no, and then report it afterwards?

A. I would not say that. I went straight to Aberdeen when I crossed the border.

Q. Was there any congestion at the border so

(Testimony of William Ewald Anderson.)

that you could not have gone through in the regular course?

A. No, I would not say there was.

Q. But you knew at the time you crossed the border on foot that you had been excluded and not permitted to pass through?

A. Yes, I had been excluded, yes.

Q. And you never have at any time since you have been back to the United States attempted to be repatriated.

A. That has been my great wish, but since the Immigration has been holding these hearings, I figured I was not eligible to apply for repatriation.

Q. You did not make any attempt to do so?

A. I have discussed it with my attorney many times.

Q. But you have not discussed it with the Immigration officials?

A. I have not personally, no.

Q. Isn't it a fact, Mr. Anderson, that when you did report at Aberdeen, your unlawful crossing of the border, [48] that you were immediately placed under arrest and posted bond?

A. No, I don't think that is correct. I was not placed under arrest.

Q. You were not placed under arrest? What date was it that you say you reported at Aberdeen?

A. Oh, I would say it was around the 3rd or 4th of January, 1940.

Q. Then there was an investigation held, was there not?

(Testimony of William Ewald Anderson.)

A. Yes, in the office of the Immigration.

Q. Where?

A. In the office of the Immigration.

Q. Where? Aberdeen?

A. In Aberdeen, yes.

Q. And you were then placed under arrest after the conclusion of that hearing?

A. No, I was not. I was released.

Q. You were released on bond. You put up bond, didn't you?

A. I can't recall that particular point.

Q. Well, if the record shows that you were taken into custody and placed under bond, would you say the record is correct?

A. If the record shows I was.

Q. That was on the 22nd day of January, 1940.

A. Yes, that was later. I thought you were referring to the time I reported to the Immigration.

Q. That is all. And you are still on bond?

A. Yes, I am still on bond.

Mr. Belcher: That is all.

Redirect Examination

By Mr. Merges:

Q. What date was it approximately that you reported to the Immigration? A. January 4th.

Q. January 4th? A. 1940.

Q. And that was immediately after you came across the border, is that correct? A. Yes.

Q. And you were not arrested until when?

(Testimony of William Ewald Anderson.)

A. Probably later that month.

Q. Probably later that month? A. Yes.

Q. After you were arrested later that month, did you put up bond? A. That is correct.

Q. But you had reported some time previous to to that time? A. Yes. [50]

Q. I believe you testified that the reason you have not applied for naturalization is because your attorney,—since you have been back, your attorney advised you that until this matter that is pending is settled, you should not do anything about it?

A. That is right.

Q. And you took his advice and decided to wait until it is settled? A. I did that.

Q. What do you propose to do when this is settled, if you are permitted to remain in this country?

A. I intend to apply for repatriation as soon as possible.

Q. Was it your impression that you had abandoned your American citizenship when you applied for naturalization in Canada?

A. No, I was always of the opinion that you can always maintain your nationality.

Q. You thought that when you came back in 1935 you were an American citizen?

A. I thought after a certain period of residence I could reestablish myself, yes.

Mr. Merges: I think that is all.

(Testimony of William Ewald Anderson.)

Recross-Examination

By Mr. Belcher: [51]

Q. At the time of the judgment and sentence, at the time the judgment and sentence were entered against you for having unlawfully entered the United States, and you were sentenced to the prison camp at McNeill Island, do you recall whether or not the judgment and sentence provided that at the expiration of the term in the penitentiary that you should be immediately deported to Canada? A. The decision did not state so.

The Court: Does the record show that judgment?

Mr. Belcher: The record does not show that judgment. May I have a moment to go down and get the file?

The Court: Who was the judge who entered the judgment?

Mr. Belcher: The record does not show, your Honor. I have the number of the case.

The Court: Is it in this court here in Seattle?

Mr. Belcher: Yes, No. 45,571, with a sentence of eleven months and a \$500 fine on Count 1.

Mr. Merges: To save time,—I have no objection to this procedure, but it seems to me it is entirely irrelevant, because the only question [52] before the Court is whether or not the authorities were justified in what they did.

The Court: That would be true ordinarily, but you discussed the sentence, how much it was, and

(Testimony of William Ewald Anderson.)

how much extra time he served, and it has become proper. What I am to do with it is for later determination, but at least you examined on it.

Mr. Merges: I am not making any objection to it, because I don't think it makes any difference. I think possibly we might go on to something else while we are waiting for the file.

The Court: Have you anything else to take up, Mr. Belcher?

Mr. Belcher: I think I have gone as far as I can.

The Court: Have you something else?

Mr. Merges: I would like to call Mr. Anderson's wife. I guess the file is here now.

Q. (By Mr. Belcher): In Cause No. 45,571,—you are the same William Ewald Anderson who was named defendant in that cause? A. Yes.

Q. That case was tried before a jury, was it not?

A. Yes.

Q. On two counts? [53] A. Yes.

Q. And you were found guilty on both counts, were you not, by the jury?

A. I did not know there were two counts on it.

Q. You are the same William Ewald Anderson against whom a judgment on the verdict of the jury was entered by Judge Bowen on the 14th day of March, 1942, wherein you were sentenced to a period of eleven months and to pay a fine to the United States of America in the sum of \$500, and to stand committed until the fine is paid or otherwise discharged by law. Is that right? A. Yes.

Q. Correct? A. That is correct.

(Testimony of William Ewald Anderson.)

Q. There was nothing in the judgment that required immediate deportation.

The Court: Is there any reason I should not see it?

Mr. Merges: No, none whatsoever.

Mr. Belcher: I will offer the entire file to supplement, so far as the judgment is concerned,—

Mr. Merges: I will object to it, if your Honor please, on the ground that it is wholly immaterial to the issue involved here. It does not prove or disprove one way or the other whether this man is affiliated with or a member of the Communist Party.

The Court: What are you offering?

Mr. Belcher: I am offering a copy of the judgment in Cause No. 45,571, together with the verdict of the jury and the indictment, with the privilege of furnishing certified copies.

The Court: The indictment, verdict of the jury, judgment and sentence are admitted. The objection is overruled. Certified copies are to be furnished. I think I have made clear already the reason. The petitioner has been advised of the charge against him, the sentence, his service of it, the fine, the good-time allowance, and while the matter might have been immaterial, the petitioner having put that much in, the Government may put in evidence so much more as may clarify the exact situation.

You may proceed.

Mr. Belcher: That is all.

Mr. Merges: That is all.

(Witness excused.)

MRS. WILLAM EWALD ANDERSON

A witness produced on behalf of petitioner, being first duly sworn, testified on oath as follows: [55]

Direct Examination

By Mr. Merges:

Q. Will you state your name to the Court, please?

A. Mrs. William Anderson.

Q. Will you state your own first name?

A. Gladys.

Q. You are the wife of William Ewald Anderson, the petitioner in this case, is that correct?

A. I am.

Q. Where do you live? A. Seattle.

Q. Are you living with Mr. Anderson?

A. I am.

Q. Who else lives with you?

A. Our two sons.

Q. Are you a citizen of the United States?

A. Yes, I am.

Q. By reason of birth in this country?

A. That is right.

Q. When and where were you born?

A. June 5, 1911, at Othello, Washington.

Q. Where?

A. Othello, Washington.

Q. Have you ever renounced your United States citizenship? [56] A. I have not.

Q. Where were the boys born? A. Seattle.

Q. How old are they?

A. Don is 17 and Gene is 19.

(Testimony of Mrs. William Ewald Anderson.)

Q. Have they ever been outside of the country?

A. No, they have not.

Q. Have they ever renounced their United States citizenship? A. No.

Q. Are they the legally adopted sons of Mr. Anderson? A. They are.

Q. Will you state whether or not he is a father to them? A. Yes, he is.

Q. Upon whom are they dependant for support?

A. Upon him.

Q. Upon whom are you dependent for support?

A. Upon him.

Q. Has he ever failed to support either you or the boys? A. No, he has not.

Mr. Belcher: It seems to me this is going pretty far afield of the question before your Honor.

The Court: Well, it would have been, but he testified to these matters without objection. Insofar as what you are saying is an objection, it is [57] overruled.

Q. You have been working, have you not?

A. Yes, part time.

Q. And will you tell the Court why you have been working?

A. Well, for the past seven years I have had to work nearly steady to help supplement our income because of the expense connected with sickness in the family.

Q. Will you state to the Court what your physical condition is?

(Testimony of Mrs. William Ewald Anderson.)

A. Well, I am under constant care of a physician, and have been since 1940, and practically constantly since 1946.

Q. Did you undergo a major operation recently?

A. I have undergone two major operations in the past two years.

Q. In the past two years? A. Yes.

Q. Who performed them?

A. Dr. R. E. Tennant.

Q. At what hospital were they performed?

A. Columbus.

Q. What was the nature of the operation?

A. Well, I had a total hysterectomy.

Q. And have the results of the operations been successful? A. No.

Q. Is your physical condition such that you will be able to continue work?

A. No, not steadily. I should not be working at all.

Q. Do you wish to remain in this country?

A. Yes.

Q. Do you wish your boys to remain here?

A. Yes.

Q. Do they propose to go to some institution of higher learning?

A. Yes, they both want to go to the University.

Q. Has your husband indicated a willingness or desire to put them through school? A. Yes.

Q. Do either of the boys wish to go to and live in Canada? A. No.

(Testimony of Mrs. William Ewald Anderson.)

Mr. Merges: That is all.

Mr. Belcher: No questions.

The Court: I have some questions, if I may have counsel's consent?

Mr. Merges: Yes, certainly.

Examination by the Court

Q. When were you and Mr. Anderson married?

A. July, 1939. Today is our anniversary.

Q. And you were married on the 19th? [59]

A. Yes.

Q. When were the two boys adopted?

A. In 1946, I believe, or 1947.

Q. 1946 or 1947?

A. Yes. We waited until they were old enough to decide whether they wanted to be adopted.

Q. Where were you married?

A. Vancouver, B. C.

Q. Was there any proceeding pending against your husband at that time?

A. Yes, the original exclusion from the United States.

The Court: I have nothing further. Have either of you anything?

Mr. Merges: Yes, since the Court is interested in that phase of the case, I would like to bring out something more about it.

(Testimony of Mrs. William Ewald Anderson.)

Direct Examination

(Resumed)

By Mr. Merges:

Q. You and Mr. Anderson lived together before you were married, is that correct?

A. That is right.

Q. How long? A. A year and a half.

Q. And why didn't you marry? [60]

A. Because he did not have a divorce.

Q. I beg your pardon?

A. His divorce was not final.

Q. His divorce was not final? A. Yes.

Q. Did you marry as soon as the divorce became final? A. Yes, immediately.

Q. Did you intend to marry when you were living together then? A. Yes.

Q. Was there any other reason why you didn't marry other than the fact that you could not legally do so? A. No.

Mr. Merges: That is all.

The Court: Have you any questions, Mr. Belcher?

Mr. Belcher: No.

The Court: I may ask a few more.

Examination by the Court

(Resumed)

Q. When did he start his divorce?

A. January, 1939.

Q. He started his divorce in January, 1939.

(Testimony of Mrs. William Ewald Anderson.)

Where was his wife living? A. Vancouver.

Q. B. C.? A. Yes.

Q. Where did he start his divorce?

A. In Vancouver.

Q. Did he get the divorce, or she?

A. She got it.

Q. She got the divorce. Have they any children? A. Two.

Q. Where are they? A. Vancouver.

Q. Do you know how old they are?

A. 24 and 25. I would like to add, your Honor, that they visit us regularly and think a lot of both my husband and I. In fact, they were just down over the Fourth of July to visit us.

Q. What happened to your first marriage?

A. Divorce.

Q. When were you divorced? A. 1936.

Q. Who got it?

A. I did, and received custody of the children.

Q. What?

A. I got custody of the children.

Q. When did you and Mr. Anderson start living together? A. In 1938; March, 1938. [62]

Q. Were you connected with the union?

A. No.

Q. Was your former husband?

A. No. I belonged to the auxiliary, the women's auxiliary, but not to the union itself.

Q. How did you belong to the women's auxiliary?

(Testimony of Mrs. William Ewald Anderson.)

A. Wives and sisters and daughters of union men—the women had an auxiliary organization that they could belong to if their husbands were in the industry.

Q. When was it that you joined?

A. I can't recall the exact date.

Q. What year? A. 1938, I imagine it was.

Q. What was the basis of your joining?

A. What was the basis?

Q. Whose relationship allowed you to join?

A. We were living together as man and wife, and everybody took it for that.

Q. You and Mr. Anderson were going under the name of Mr. and Mrs. Anderson?

A. That is right.

Q. You were supposed to be married?

A. That is right.

(Witness excused.)

Mr. Belcher: May I have the privilege of [63] recalling Mr. Anderson for a question.

The Court: You may.

WILLIAM EWALD ANDERSON

a witness produced in his own behalf as petitioner, having been previously sworn, testified on oath as follows:

Cross-Examination

(Resumed)

By Mr. Belcher:

Q. Mr. Anderson, is it a requirement of the International Woodworkers Union that district officers be American citizens? A. No.

Q. It is not? You are quite sure of that?

A. I am not positive about it, but I don't believe there is anything in the constitution to that effect.

Q. Did you disclose to the lodge that you were a Canadian before they elected you to office?

A. I was never asked that question.

Q. You were never asked that? A. No.

Q. The members of the lodge were led to believe——

The Court: When you speak of "lodge" what do you mean?

Mr. Belcher: International Woodworkers of America. [64]

Q. ——were led to believe by your conduct that you were an American citizen?

A. Well, they didn't seem to care because I seemed to represent them.

Q. Didn't you have to tell anybody when you joined the union whether you were an American citizen or not?

(Testimony of William Ewald Anderson.)

A. I never concealed the fact, and I was never asked the question.

Q. Don't you have to sign an application to join one of those unions? A. Yes.

Q. Don't they ask your nationality?

A. No.

Q. And it is not a requirement that you be an American citizen to be an officer of that union?

A. No.

Mr. Belcher: That is all.

Mr. Merges: That is all.

(Witness excused.)

The Court: Anything further?

Mr. Belcher: We offer in evidence the Immigration files.

The Court: What is that? What is before me?

Mr. Belcher: Yes, what is before you.

Mr. Merges: The entire record of the [65] Immigration Service?

The Court: The entire Immigration record is there, is it?

Mr. Belcher: Yes.

The Court: Any objection?

Mr. Merges: No objection.

Mr. Belcher: The Government rests.

Mr. Merges: We rest except for argument.

The Court: Petitioner and government rest as to evidence.

This petitioner has been in the United States a long time. No one could criticize the Immigration

Board of Appeals under the evidence for being too hasty in rendering its decision. Therefore, certainly, that Board cannot properly complain if I take a reasonable time to familiarize myself with this record. I am assuming that Mr. Anderson does not care how long I take.

Mr. Merges: The Board took two and one-half years, and the only reason they decided the case was because I had to write them and beg them to decide the case because the bond that was up was part of Adam Beeler's estate, and we could not close the estate until the Government made some progress.

(Discussion off the record.) [66]

The Court: I don't know just how long it will take. I will endeavor to determine it reasonably soon, but in view of the apparent time without reason taken by the Board, I feel that I should give preference to other litigants who have been endeavoring to present their matters speedily over this matter, first, because the Board at least has no right to complain, and, second, because I know Mr. Anderson and his attorney do not care how long I take.

Mr. Merges: If your Honor please, I would not say that. I would like to get it determined. I don't say I don't care how long you take because he wants to get his problem straightened out. After all, it is tough on his wife and children. I am not urging the Court to make a speedy decision. I would like to have the opportunity of oral argu-

ment, because I am very familiar with this case, and I think it might be of some assistance to the Court.

The Court: From what has been suggested to me and a casual examination that I have made of the trial briefs or memoranda, I am satisfied that after I have looked at the record I will wish the help of argument from each side. I did not analytically read the trial memoranda. I have read such as I [67] mentioned casually, so as to let me better appreciate the purpose of the showing made today. I am assuming that much of the showing made today—perhaps all of the showing made today—at most merely amounts to an explanation to the Court.

Mr. Merges: To save the Court's time is all.

The Court: If on the record Mr. Anderson is entitled to prevail, he should. If on the record he is not entitled to prevail, I doubt very much that anything that happened here today could change it. That is not a ruling. I am satisfied in any event that very much of what has been presented today is not the basis for a decision. Primarily, the record is what must be decisive.

Mr. Merges: If I may say so, I think what we have presented today will assist very materially in going through the record, because if you had to start on it cold, it would be a terrific job. I know, because I did. I inherited it from Judge Beeler, and I started on it cold.

The Court: I am satisfied of that. I am of the

opinion that the Court's time will be much saved by what happened this morning and that in addition my examination of the record has been made much easier. [68]

Thank you.

This matter is adjourned subject to call. In other words, it is understood that before I render an opinion I am going to call counsel in for the purpose of asking at least argument on those phases that I feel I need help upon.

(Hearing adjourned.) [69]

November 4, 1949

The Court: I have asked counsel on both sides to be present at this time.

This proceeding before it reached the Court covered a surprising period of time. After the petition was presented to the Court the Court upon repeated requests by or in behalf of the petitioner continued the hearing. The matter was presented to the Court on the 19th of July of this year.

The many years during which the proceeding had been pending before reaching the Court have resulted in a very substantial and very complicated record. Such substantial and complicated record was made more complicated by being confused with duplicates and triplicates, some of which duplicates were in whole and in part and some of which were only partial as to even parts.

As a result, plus other obligations of the Court and other litigation, the matter of determining the

issue has been continued until this date. Ordinarily, I would feel considerable concern for the delay, but in the light of the previous history, I take it that what ordinarily would be tardy action on the part of the Court is quite prompt.

I am going to announce my decision today. I will not set forth the reasons for such conclusion. I felt that the parties should know at this time what the decision is. Upon my return from California the appropriate documents can have been prepared, served and then presented to the Court for signature.

I have examined this complicated record and carefully refreshed my memory by the notes as to what occurred in open Court. I have considered the argument of counsel and the citations of authorities presented. I am satisfied under the law governing this proceeding before me that this Court would not be justified in setting aside the determination that has been made. I find no arbitrary action on the part of the authorities. I find that under the rules and law applicable to them that they have acted within their authority. I find that under the rules and law applicable to the hearings and proceedings before them that their conclusion was supported by substantial evidence.

It is not necessary to say whether some other tribunal would or would not have reached the same conclusion. I am satisfied to say today that the authorities had the lawful right to find as they did, and, therefore, the writ will be denied.

If there is an emergency that requires that I

sign the appropriated documents today before I leave, such can be signed. My own opinion was that the government [71] has no right to be critical if the matter is delayed until my return.

Mr. Belcher: There is no emergency.

The Court: My assumption is that the petitioner would prefer to have such period to make preparation for whatever course he decides to follow. So I am assuming that not only would the government not be justified in being critical but, actually, the government has no objection to that delay.

Mr. Belcher: That is correct.

The Court: I am assuming that the petitioner would prefer that the matter go over until December. Is that right, Mr. Merges?

Mr. Merges: That is correct.

The Court: On Monday, December 12, at 10:00 a.m. I will fix a time for giving an oral opinion setting forth some of the reasons for my having come to the conclusion I have. The oral conclusions will be what I have already said, that under the law and the rules I do not feel I would be justified in setting aside the conclusion and determination that has been reached by authorities whom I find had the authority and legal right to decide as they did.

So if you will be here on the 12th of December, I can fix a time for giving you some more reasons. Then [72] you will be prepared to present appropriate documents.

Is that satisfactory?

Mr. Belcher: That is satisfactory, your Honor.

Mr. Merges: That is satisfactory, your Honor.

The Court: It is satisfactory to both sides. [73]

[Title of District Court and Cause.]

COURT'S ORAL DECISION

The Court: Counsel are here in connection with announcement of some of the reasons that caused the Court heretofore to advise Counsel that it was denying the petition for writ of habeas corpus in the Matter of the Petition of William Ewald Anderson for a Writ of Habeas Corpus, Cause No. 2083.

In the first instance, the Court may say it did not find in the voluminous record which the Court studied carefully any legal justification for setting aside the holdings and decision of the Immigration authorities. It is a well established principle of law that the Court in a habeas corpus proceeding is not authorized to substitute its judgment for the judgment of Immigration authorities merely because the Court might have come to a different conclusion had it been in a position of authority in the Immigration Department and acting in connection with the matter before the Immigration authorities.

So at the outset I may repeat that I find no justification legally for substituting my judgment for the judgment exercised and announced in the Immigration proceedings.

So that there will be no mistake, I may say I have no quarrel with the decision of the Immigration authorities. Even if I did have authority to substitute my judgment for theirs, I am satisfied that I would not feel justified in so doing.

There are a number of matters urged as a combined appeal to the sentiment of the Court in the hope that such would cause the Court to hold that it had a power which I am satisfied it does not have. But, analyzed, the appeals to the sentiment of the Court are of a character which, if successful, would establish dangerous precedents.

One of the appeals is based upon the fact that the petitioner is married to an American citizen. An analysis of all the facts and circumstances surrounding that marriage and surrounding the period preceding the marriage makes it clear how dangerous the precedent would be if such was permitted to set aside long enunciated principles of law applicable in connection with a habeas corpus proceeding with respect to immigration.

The petitioner, while born in the United States, was alleged to have become a Canadian citizen so that he might make about one voyage as a fisherman, the privilege of so doing being restricted to Canadian citizens. Digressing for a moment, I may say that I am not highly impressed with the deep feelings of American patriotism of any individual who is willing to give up his citizenship wholly for the purpose of making it possible for him to engage in one particular kind of work. There is no showing attempted—I am sure none could have been

made—indicating that the petitioner could not have retained his American citizenship and had other employment in Canada. But, in any event, after the petitioner chose to trade his American citizenship for an opportunity to do a particular kind of work, he decided to and later did return to the United States. He was already married to a Canadian woman pursuant to a marriage performed in Canada, and had children as a result of such marriage. Nevertheless, after he arrived in the United States he commenced to live with a woman who is now his wife. She knew he was married. She must have known that it was unlikely that he ever could be divorced save and except as his Canadian wife chose to secure a release from the matrimonial bonds. He had no reason or excuse for a divorce. She elected to live with him under pretended marriage. She had two children by a former husband.

In connection with certain union activities he returned to Canada in 1938, and in January, 1939, was detained by the Immigration authorities who were questioning his right to enter the United States. Some two months later his Canadian wife secured a divorce. Thereafter, and while he was detained in Canada, and while his present wife realized that he might never be allowed to enter the United States, she chose to go to Canada and entered into a marriage with him. Whether or not among other purposes of that marriage the petitioner and she thought it would aid his return to the United States, I do not know, but in any event

if such a marriage after his immigration status was under substantial question should be an excuse for exercising clemency and leniency, it would be a precedent for other applicants for immigration.

In the latter part of 1939, after a hearing, the Immigration authorities denied his right to enter. He appealed. While the appeal was pending, and wholly disregarding the laws of the United States, he illegally, wilfully, and intentionally came across the border, eluding inspection.

The implication is difficult to overlook that he came to the conclusion that if he got into the United States, even illegally, that it might take a long time to get him out regardless of his lack of legal right to be in the United States. If that was his purpose and intent, he certainly succeeded in his endeavor because this is December of 1949, and he is still here, this in spite of the fact that, unquestionably, he had no right to be in the United States at all. He came here illegally. The illegality of that entrance is *res adjudicata* because he pleaded guilty to such illegal entry, was sentenced and complied with the imprisonment requirements pronounced.

Under the law, immediately such imprisonment had been ended, he had no right to expect he would not be forthwith deported. Nevertheless he has continued to stay.

In due course he adopted the two former sons of his wife who before she married the petitioner chose to run whatever risk there was of living with

him. These two adopted sons are American citizens. In no way did they depend upon any apparent right of the petitioner to legally live in the United States. I am not presented with a question of where the authorities permitted him to come here, where a woman in good faith married him relying upon his apparent right to stay and where children were adopted having no reason to believe there was any question of his right to remain. I am presented with a question where the marriage and adoption were both made in the face of refusals to allow him to enter and adjudications that he had no right to stay, adjudications by Immigration authorities. And regardless of how sincere the adoption may have been, to allow them to overcome the plain legal principles involved would be again to create a hazardous precedent. It certainly would be taken advantage of in the future by those who pretended sincerity and had no real intent except strategy.

I cannot consider other than that when the defendant intentionally and wilfully entered the United States during the pendency of his appeal in violation of the Immigration authorities' decision appealed from that he abandoned the appeal. But even if such conduct on his part was not an abandonment of the appeal, he still has no legal right to remain. In any event he entered illegally. The law is plain that one who enters illegally has no right to a court decree saying that he can stay in defiance of the decisions of the Immigration authorities.

Further than that, he was convicted of an offense which provided for deportation after the sentence imposed was complied with. I am not overlooking the contention that the Immigration authorities had the right to exercise discretion as to ordering his deportation, based upon the contention that he was not a member of an organization advocating the overthrow by force and violence of the United States Government, or which circulated literature to such effect, all as more particularly and definitely set forth in the applicable statute.

I have heretofore read the record carefully and examined the various publications introduced in evidence. I am not able to say at all that the Immigration authorities, the Board of Special Inquiry and those appealed to did not have substantial evidence before them of such membership by the petitioner in such an organization so advocating overthrow of this government and so circulating such literature. While it can be argued by some persons that plain statements in the literature introduced in evidence are merely figures of speech, it is difficult for me to see how anyone can contend at least that the ordinary, normal individual does not have a right to say they mean what they say. Certainly the literature presented in evidence constitutes substantial evidence of the type of an organization and of the kind of literature involved even though I might have the academic view that some individuals have expressed that what is plainly said means something different. Certainly I have

no right to say that other individuals do not have the right to come to the conclusion that would ordinarily be expected of a reasonable and normal mind. Personally, I see no occasion to differ with the conclusion which the Immigration authorities came to with respect to the literature involved, but, as I have said before, even if I differed in conclusion as to such, that is a far cry from saying that the Immigration authorities had to disregard their conclusions and follow those that some judge later might express.

I have examined the file carefully from the standpoint of his membership in the organization. The Court has no duty to exclude evidence before the Immigration authorities where they comply with the rules of the hearing before such Immigration authorities merely because the evidence might not have been admitted under the different and more technical rules of a court of law. That principle has become a well recognized one in habeas corpus proceedings. There was substantial evidence which gave the Immigration authorities the right to decide as they did as to membership, and no subsequent judge or judges under the decisions as I read them have the right to substitute their judgment if it should happen that their judgment would have been different had they been exercising the function of a special board of inquiry or some higher official in the Immigration Department.

True, there were a number of witnesses who said that Mr. Anderson was a patriotic American and not a Communist. The striking thing in the record

is that no individual who admitted he either was a Communist or had ever been expressed the view that the petitioner had not been a member of the organization. In fact, every individual who said he was a Communist or ever had been and was therefore in a position to testify convincingly on the question, contradicted at least the testimony of the petitioner.

It is true that the picture painted strongly indicates that those in control of the Communist Party have long had the policy and design of making it extremely difficult to prove anyone was a member of that organization, and in this case it would seem that the true name of the member is the one name that is avoided.

There were some witnesses that undoubtedly the Board of Inquiry felt were sincere in this testimony who strongly vouched for the petitioner. Regardless of how much confidence the Board had in the sincerity of such witnesses, it was not compelled because of confidence in their sincerity to believe that the witnesses were not mistaken. Some of the witnesses who appeared for the petitioner may well have aroused considerable doubt in the Board of Inquiry as to their sincerity. It is unnecessary to name names, but there was more than one whose endorsement would by some persons be viewed as the deserved "kiss of death." I may say that I have a high regard for Senator Morgan, now deceased. I have no reason to believe that the Board of Inquiry did not share that high regard.

One of the persuasive arguments made is that Mr. Anderson could not possibly have been elected to the union position he held by the American members thereof who made up such an overwhelming proportion of those on the union rolls had he been a Communist. That persuasive argument loses much of its appeal when it is considered that one of the witnesses who appeared before the Immigration authorities after Attorney Beeler represented the petitioner stated that he while a Communist had been elected as an officer of that same union. It can only be considered that the members of the union were fooled as to this witness, and if they could be fooled as to his Communistic activities, it is not at all convincing that they might not be deceived as to those of the petitioner. I well recognize the contention that one of the original witness—I think Mr. Deskin, who testified as to Mr. Anderson's Communist Party membership later, as the petitioner's attorney argues, recanted. But the recantation, if it be denominated such, was one whose implication was still strongly against the petitioner. The petitioner, it must be remembered, has always contended he was never a member of the Communist Party. The recantation quite clearly was one that the witness was persuaded to make in an endeavor to show that he was not working against the interests of the working class, but in such so-called recantation he definitely and very obviously avoided saying that the petitioner had not been a member of the Communist Party

ever. He persisted in saying merely that there had come a time when, in his belief, the petitioner was not a member. The logical interpretation of that evidence which the Special Board of Inquiry and reviewing authorities had the right to consider was that the witness was still firmly convinced that the petitioner had been a member of the Communist Party, and, ergo, that the petitioner had falsely testified in denying such.

It will also be found in the record where one witness that petitioner's counsel claims was vague, interestingly avoided saying that the petitioner had not urged people to join the Communist Party under certain conditions by his shrewdly worded answer that under certain other and different conditions he had never heard the petitioner urge anyone to join.

Assuming that the Immigration Board had no right to doubt the sincerity of any of the witnesses presented by petitioner, although as I have said there are persons who would doubt some of them, still the Special Board of Inquiry certainly rightfully could have ascribed their sincerity as arising through the same mistake that the members of the union had made who had voted to union office the witness who testified in the proceedings here in the United States after the petitioner's unlawful entry, and who, according to his testimony, had been elected while a Communist.

I have considered the contention of the petitioner that the file breathes prejudice on the part of the Immigration authorities. As a matter of fact, the

entire record is very indicative that the Immigration authorities, viewed as a whole and including the reviewing boards, were trying to favor the petitioner as far as they could. Even in 1939 the decision that he could enter the United States for the purpose of resuming adulterous living in the United States was not one corroborative of the petitioner's contention. I recognize that they say the Supreme Court decision in *Hansen vs. Haff* 291 U.S. 559 requires that holding. In my reading of *Hansen vs. Haff* 291 U.S. 559, I find ample opportunity for any authority or authorities prejudiced against Mr. Anderson to have said that the facts involved were so different from those in *Hansen vs. Haff* as to justify affirmance of the Special Board of Inquiry's position on that point.

It seems to me that anyone calmly and dispassionately analyzing this entire record can only come to the view that if there has been any mistake, the mistake has been in allowing petitioner to remain so long in the United States in the face of the record and in view of the law laid down by a host of decisions.

I am not at all unsympathetic with the wife. I assume that regardless of whether or not she had thought it might help her husband's legal position that in any event she would have married the petitioner, once the Canadian divorce was secured. I have real sympathy for the two young men who, of course, in no event are to blame, and I am assuming that the adoption was sincere as to each and would have occurred had there been no such pro-

ceedings as have been pending. But I have no right to overlook the consequences of using a marriage while an individual is under fire or adoptions when an individual has been ordered deported. To permit such to set aside the established law would be to solicit such marriages and adoptions by those having no design except to take advantage of the human feelings of Immigration authorities and of courts.

What I have said today has not been intended to be and has not been a legal exposition, but I think what I have said today makes clear why I must follow the law and legal principles which have been established so long and so plainly.

The petition is dismissed.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

June 22, 1950

Black, J.

Appearances:

EDWARDS E. MERGES,

Attorney-at-law, for and on behalf of Petitioner.

JOHN E. BELCHER,

Assistant United States attorney, for and on behalf of Respondent.

The Court: The Court heretofore on November 4, 1949, after careful consideration of all the records, exhibits, evidence and issues involved, announced that the petition for a writ of habeas corpus was denied, at which time counsel were advised that later some of the reasons which appealed to the Court as supporting such decision would be stated. On December 14, 1949, in pursuance of such advice of November 4, 1949, the Court rendered its oral opinion.

After findings of fact, conclusions of law and decree were presented for entry and while the Court was considering certain proposed changes as to the findings of fact, the petitioner on March 17, 1950, and after the decision of February 20, 1950, of the United States Supreme Court in *Wong Yang Sung vs. McGrath*, 339 U.S. 33, filed a motion asking the Court for a reconsideration of the entire record and for the granting of the writ of habeas corpus notwithstanding such oral decision of the

Court. Respective counsel were accorded full opportunity to and did argue every phase of the entire matter from the inception as they desired.

While counsel for petitioner in connection with such motion filed March 17, 1950, strongly insisted that the Administrative Procedure Act of June 11, 1946, 5 U.S.C.A. Sec. 1001 et seq, had not been complied with as to petitioner and urged that under such Act petitioner was entitled to the writ prayed for, it should be noted that never prior to March 17, 1950, had petitioner or counsel for petitioner in any way argued or even indicated that said Act was in the slightest degree or at all applicable to the proceedings involving him.

This Court, notwithstanding the lateness of petitioner's suggestion, again carefully examined the entire record, files, exhibits and evidence with respect to whether or not the Administrative Procedure Act related thereto in whole, as claimed by petitioner, or at all.

After such careful consideration and reexamination of every aspect of the matter the Court is still of the opinion that the previously announced denial was correct.

Petitioner since such tardy suggestion has argued that all the many hearings held between 1939 and 1945 before the Administrative Procedure Act was ever enacted, as well as long before any effective date of that Act, which as to appointment of Examiner was June 11, 1947, Section 1011, should be set aside because not in compliance with an Act that did not then exist.

Plainly the Act does not apply to the hearings had before its enactment. No hearings were had after it was passed. And it does not appear that the petitioner would have had any rights under the Act as to anything since its enactment that he was not afforded. But even if he would have been entitled to some technical right under the Act after its enactment had he or his counsel timely asked the Immigration authorities for such, he should not now be able to successfully complain.

To approve the position of counsel for petitioner beginning in March, 1950, would establish a precedent hazardous in the extreme.

This Administrative Procedure Act because of the subsequent time of its enactment, because of the subsequent effective date therein stated, and because of the specific language of the Act, did not apply to the proceedings before the Immigration authorities as to this petitioner. Aside from that petitioner, represented all the while by experienced counsel, waived any right to object to the procedure followed.

I can find no basis, either legally or equitably, for the issuance of the writ of habeas corpus sought. Every suggested sentimental ground for granting relief to him is based upon an occurrence happening after the Immigration authorities had declared their opposition to his reentry into the United States and would be a solicitation to others to insincerely copy his course as a helpful strategy.

For reasons, among others, orally stated by me on December 14, 1949, I am satisfied and find that

the Immigration authorities were acting within the scope of their powers, that they were neither arbitrary nor capricious nor acting in abuse of their discretion, and that the evidence presented to them was ample to justify the conclusions they reached.

Moreover, based on the record and under the law, I am further satisfied and further find that their actions, findings and conclusions were not contrary to the law or the Constitution; that they were supported by substantial evidence and moreover were supported by the facts to the extent that the facts were or are subject to trial *de novo* by any reviewing court. And, finally, I find that there was no prejudicial error. If there was any error on the part of the Immigration authorities, such favored petitioner and in no wise constituted prejudicial error. It must be remembered that he wilfully and unlawfully entered the United States early in 1940 and that he is still here and at liberty in spite of the efforts of the Immigration authorities to return him to the country from whence he unlawfully came so many years ago.

His conviction for wilful illegal entry established beyond all reasonable doubt that his entry then was wilful and illegal.

Such is *res judicata* between the government and the petitioner. Having come to this country wilfully and unlawfully over ten years ago, he has therefore never since had a lawful right to remain here. I have no legal or conscientious ground to interfere with the decision of the Immigration authorities that he should be deported.

Neither the recent Supreme Court decision of *Wong Yang Sung vs. McGrath*, 339 U.S. 33, *supra*, and 339 U.S. 908 *per curiam* modification, nor the *per curiam* decision of April 24, 1950, in the cause of *Yanish et al. vs. Barber, etc.* (9th Circuit) 181 Federal 2d 492, apply to petitioner's situation under the record here involved.

The distinctions between them and the instant case are definite and clear. In each of them, contrasted with the situation here, the hearings before the Immigration authorities in question were long after the effective date of the Administrative Procedure Act. In each of them, contrasted with the situation here, the one sought to be deported made timely and appropriate demand for compliance with the Act. See *Wong Yang Sung* cases, 80 Fed. Supp. 235 and 174 Fed. 2d 158, and Judge Harris' opinion in the *Yanish* case, 81 Fed. Supp. 499, and 86 Fed. Supp. 461 (*Yanish* case—Judge Erskine) for matters preceding the decision of Judge Harris. And in each of them, contrasted with the situation here, there was apparently lawful entry.

Such motion is overruled and such petition of William Ewald Anderson is, of course, again denied.

Certificate

I, K. M. Treadwell, do hereby certify that I was official court reporter *pro tempore* for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a

true and correct record of the matters as therein set forth.

/s/ K. M. TREADWELL,
Reporter pro tempore.

[Endorsed]: Filed September 29, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel for appellant, I am transmitting herewith all the original papers in the file dealing with the above-entitled action, including the Court Reporter's Transcript of Proceedings, and certified record of the Department of Justice relating to the deportation proceedings against the Petitioner William Ewald Anderson and the original warrant of arrest and the original warrant of deportation as attached to and made a part of Respondent's answer to Show Cause filed October 1, 1948; and the original Judgment, Sentence and Commitment, Indictment and

Verdict in Criminal Cause No. 45571 entitled United States of America vs. William Ewald Anderson admitted in evidence at the Show Cause hearing; and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the Conclusions of Law and final Judgment by the Court filed on July 27, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Petition for Writ of Habeas Corpus, filed Sept. 1, 1948.
2. Amended Petition for Writ of Habeas Corpus, filed Sept. 7, 1948.
3. Order to Show Cause, filed Sept. 7, 1948.
4. Answer to Order to Show Cause, filed Oct. 1, 1948.
5. Stipulation, filed Oct. 1, 1948.
6. Respondent's Memorandum, filed Nov. 8, 1948.
7. Stipulation, filed Jan. 14, 1949.
8. Stipulation, filed March 3, 1949.
9. Brief on Behalf of Petitioner, filed July 18, 1949.
10. Order, filed July 21, 1949.
11. Motion for Order Granting Writ of Habeas Corpus Notwithstanding the Oral Decision of the Court, filed March 17, 1950.

12. Government's Supplemental Memorandum, filed April 3, 1950.

13. Petitioner's Answer to Government's Supplemental Memorandum, filed April 7, 1950.

14. Petitioner's Second Memorandum on Motion for Judgment Notwithstanding the Oral Decision of the Court, filed June 19, 1950.

15. Court's Oral Decision, filed June 23, 1950.

16. Findings of Fact and Conclusions of Law, filed July 27, 1950.

17. Judgment, filed July 27, 1950.

18. Notice of Appeal, filed Sept. 18, 1950.

19. Costs on Appeal Bond, filed Sept. 18, 1950.

20. Petitioner's Statement of Points on Appeal, filed Sept. 18, 1950.

21. Designation of Record, filed Sept. 18, 1950.

22. Stipulation and Order Transferring Exhibits, filed Sept. 18, 1950.

23. Order, filed Sept. 18, 1950.

24. Court Reporter's Transcript of Proceedings, filed Sept. 29, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to wit:

Petitioner's Notice of Appeal, \$5.00, and that said

amount has been paid by the Attorney for the Appellant.

In Witness Whereof I have hereto set my hand and affixed the official seal of said District Court at Seattle, this 17th day of October, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] /s/ TRUMAN EGGER,
Chief Deputy.

The exhibits referred to herein above are further described as follows:

1. File No. 4670293, Volumes I, II, IV and VI.
2. Board of Special Inquiry Exhibits marked:
Exhibit "L"—State and Revolution, by V. I. Lenin,
Exhibit "M"—Political Education the Communist Party,
Exhibit "N"—What Is Communism, by Earl Browder,
Exhibit "O"—The Communist Manifesto, by Karl Marx and Friedrich Engels,
Exhibit "P"—Program of the Communist International.
3. Original Judgment, Sentence and Commitment, Verdict and Indictment in Criminal Cause No. 45571 entitled United States of America vs. William Ewald Anderson.

[Endorsed]: No. 12718. United States Court of Appeals for the Ninth Circuit. William Ewald Anderson, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service, for the Seattle District, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 20, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12718

In the Matter of
WILLIAM EWALD ANDERSON for a Writ of
Habeas Corpus.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant, William Ewald Anderson, and formally adopts the statement of points on appeal heretofore filed in the District Court which are as follows:

The District Court Erred in:

1. In making its oral decision on November 4, 1949, denying the petitioner's petition for Writ of Habeas Corpus.

2. In reaffirming such oral decision of November 4, 1949, by subsequent oral decision on December 14, 1949.

3. In making its oral decisions of November 4, 1949, and December 14, 1949, without granting counsel for the petitioner an opportunity to present oral argument.

4. In making its oral decision of June 22, 1940, denying the petitioner's motion for reconsideration and reaffirming its prior oral decisions of November 4, 1949, and December 14, 1949.

5. In holding that compliance with the Administrative Procedures Act of June 11, 1946, by the Immigration Authorities, with regard to proceedings taken by them in a petitioner's case after its enactment was and is not required under the holding of the Supreme Court of the United States in the case of *Wong Yang Sung v. McGrath*, 339 U. S. 33.

6. In holding that the Immigration Authorities did not abuse their discretion in ordering the petitioner deported and that their decision in so ordering him deported was supported by substantial evidence.

7. In holding that the Court's scope of review in deportation cases was not broadened by *Wong Yang Sung* case *supra*.

8. In holding that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case

of Yanish, et al. v. Barber, etc. (9 Cir.) 181 F. 2d 492, was not applicable to the instant case.

9. In making and entering paragraphs I to III, inclusive, of its Conclusions of Law.

10. In making and entering its Judgment herein, denying the petitioner's application for Writ of Habeas Corpus as prayed for and in discharging the petitioner's rule to show cause on July 27, 1950.

Dated this 25th day of October, 1950.

/s/ EDWARDS E. MERGES,
Attorney for Appellant.

Service accepted this 26th day of October, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed October 30, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSIDERATION OF
IMMIGRATION EXHIBITS WITHOUT
PRINTING

It Is Hereby Agreed and Stipulated by and between John E. Belcher, Assistant United States Attorney, and Edwards E. Merges, attorney for appellant herein, that the Immigration records and exhibits in the above-entitled cause may be considered in their original form without the necessity of printing or reproduction.

Dated at Seattle, Washington, this 25th day of October, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

/s/ EDWARDS E. MERGES,
Attorney for Appellant.

Service accepted this 26th day of October, 1950.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

So Ordered:

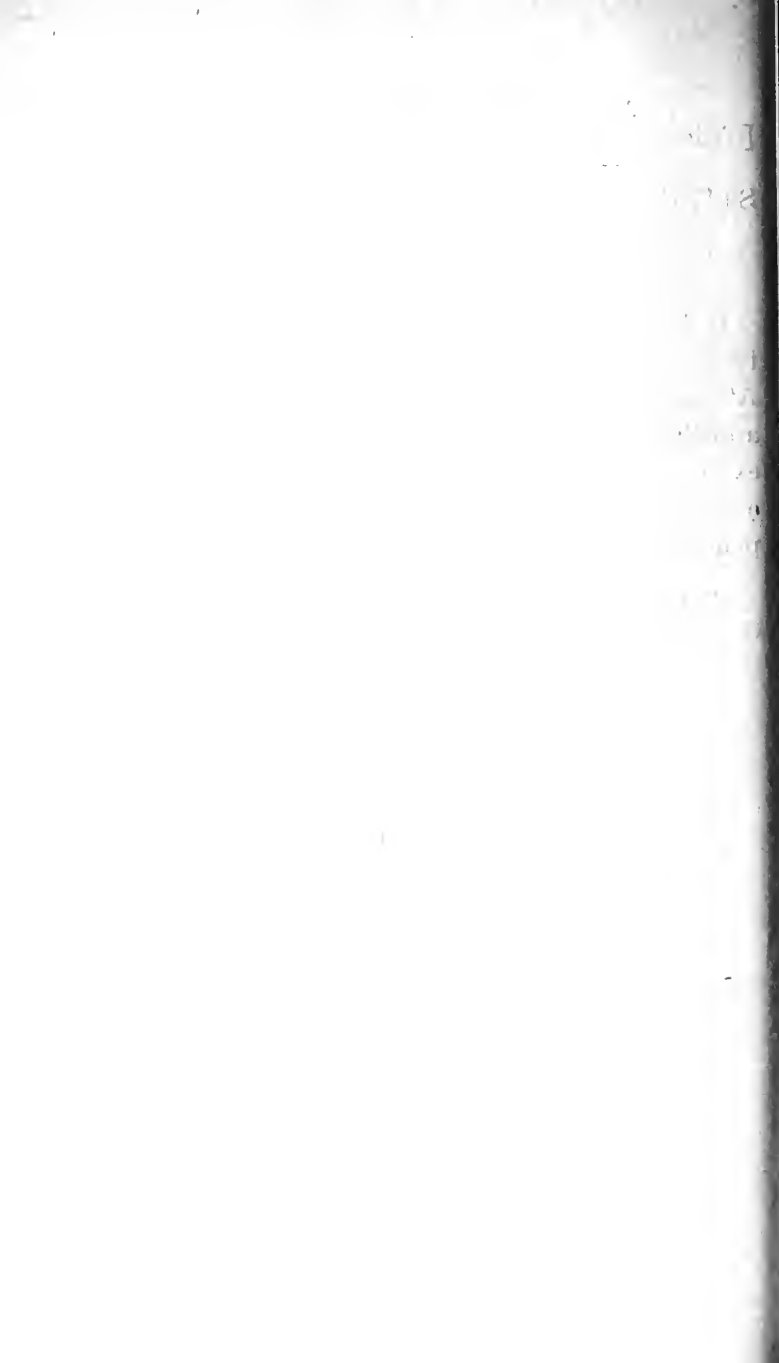
/s/ WILLIAM DENMAN,

/s/ H. T. BONE,

/s/ WALTER L. POPE,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed October 30, 1950.



In the United States Court of Appeals

For the Ninth Circuit

No. 12718

WILLIAM EWALD ANDERSON,

Appellant,

vs.

**JOHN P. BOYD, District Director, Immigration and
Naturalization Service, for the Seattle District,**

Appellee.

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION**

Honorable Lloyd L. Black, *Judge*

BRIEF OF APPELLANT

EDWARDS E. MERGES,
Attorney for Appellant.

1511 Smith Tower,
Seattle, Washington.



In the United States Court of Appeals

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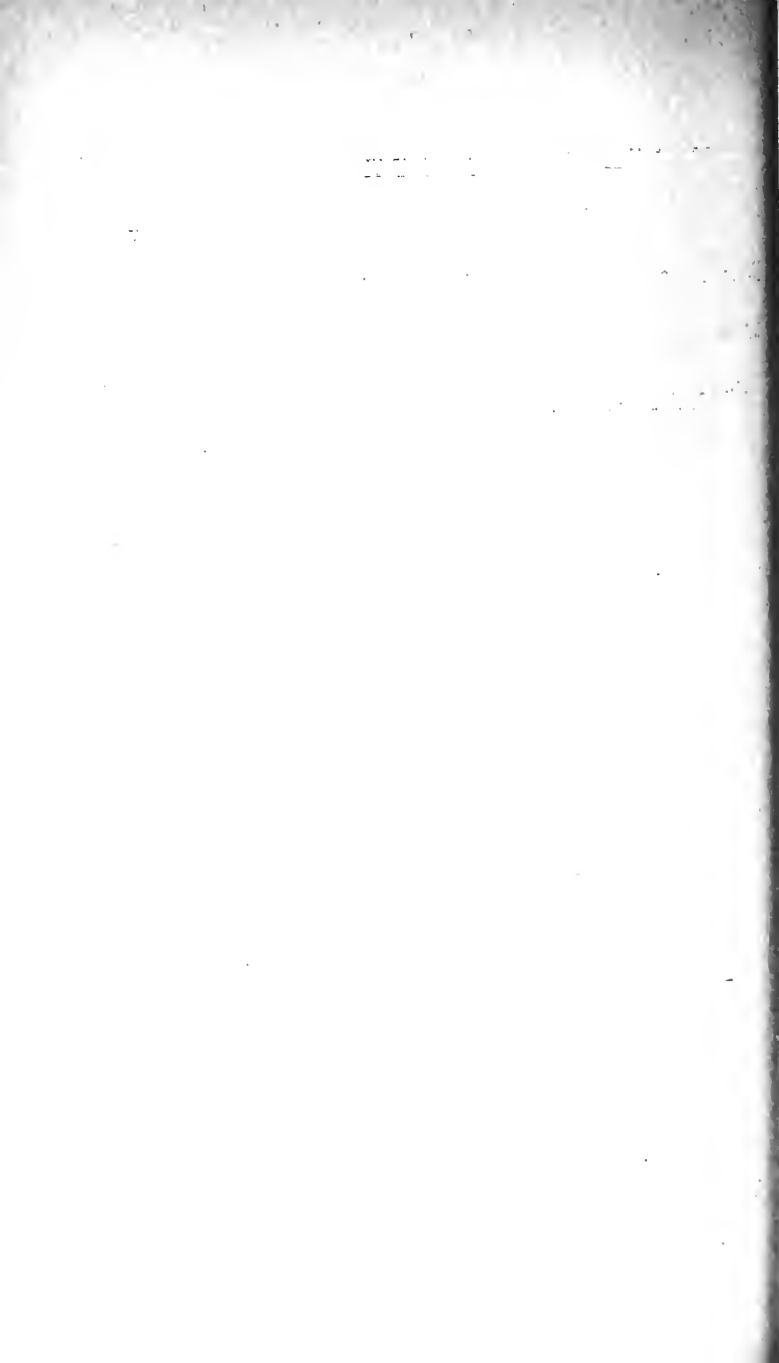
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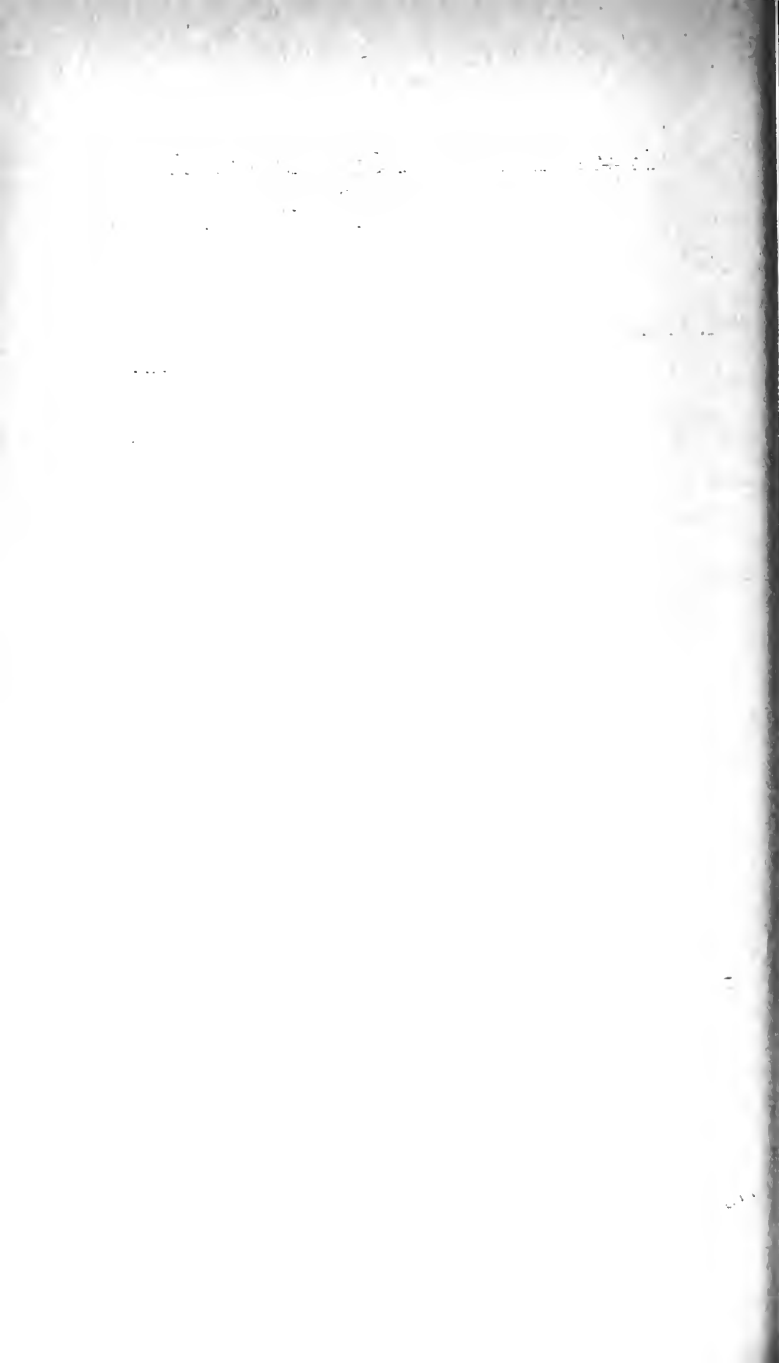
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**In the United States Court of Appeals
For the Ninth Circuit**

No. 12718

WILLIAM EWALD ANDERSON,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and
Naturalization Service, for the Seattle District,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The appellant respectfully contends that the District Court of the United States for the Western District of Washington, Northern Division, had jurisdiction of this cause below, and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this cause upon appeal to review the order in question under:

Section 41, subsection 22 of the United States
Judicial Code, United States Code Annotated, Title
28, Section 41, subdivision 22, page 643,

which reads as follows:

“Suits under immigration and contract labor laws. Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws. (Mar. 3, 1911, c.231 Sec. 24, par. 22, 36 Stat. 1093).”

That the United States Court of Appeals also has jurisdiction upon appeal under the “Administration Procedures Act”, Sec. 10a 60 Stat. ch. 324, 5 U.S.C.A. Sec. 1001 et seq. which reads in part as follows:

“(a) Right of Review—Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Appellant respectfully contends that the petition for writ of habeas corpus, as set forth in pages 1 to 4, inclusive, of the transcript of record, shows the existence of the jurisdiction above referred to.

STATEMENT OF THE CASE IN BRIEF

The appellant was born in the United States. He later became a Canadian citizen and later returned to the United States to live. The United States Immigration authorities have ordered the appellant deported on the ground that he is a Communist. The Immigration authorities base their finding that the appellant is a Communist upon ex parte affidavits of third parties.

The salient facts of the case are not in dispute and the principal question presented is whether or not in view

of them, the Immigration authorities have accorded the appellant a fair hearing and arrived at a just conclusion.

STATEMENT OF THE CASE IN FULL

The facts and background of this case appear from the appellant's undisputed testimony (T.R. 40 to 90), from the "Findings of Fact" made by the District Court (T.R. 23 to 27) and from the records and files, rulings and opinions of the Immigration authorities. Due to the fact that this case covers period of approximately ten years, a statement of the facts must be somewhat longer than usual, but as briefly as possible, it is the following:

The appellant was born in Grande Marais County, Michigan, on August 16, 1902. He lived with his parents in the State of Montana until 1915 at which time, his mother and father separated and he accompanied his mother to British Columbia where he lived until 1920. In 1920 he returned to the United States and lived with his father until 1922 when he again returned to Canada and remained until 1935. While in Canada in 1926, he took out naturalization papers as a Canadian citizen in British Columbia in order to engage in fishing in Canadian waters.

He was married to his first wife, a Canadian, in Vancouver, B. C. on August 28, 1923, and divorced from her on March 31, 1939.

In 1935 the appellant returned to the State of Washington and went to live in the City of Aberdeen. From the time of his arrival in 1935 until 1937, he was employed by the Wilson Brothers Lumber Mills, and in August of 1937, he became Secretary-Treasurer of District Council No. 3 of the International Woodworkers of America, located in Aberdeen.

The appellant continued as Secretary-Treasurer of the Union in Aberdeen until December of 1938 when he was chosen as a delegate to represent his district of the Union at a convention session in British Columbia. He went to British Columbia as a delegate to the convention and on January 2, 1939, at the conclusion of the convention, started back to the United States on a bus from Vancouver, British Columbia. He was stopped at the border by Immigration officers and was given a hearing before a Board of Special Inquiry at Blaine, Washington. The Board of Special Inquiry excluded the appellant from the United States on the ground that he was an immigrant, not in possession of an unexpired Immigration visa, that he was a person likely to become a public charge, and that he was one who admitted committing a crime involving moral turpitude, to-wit, adultery. This ruling of the Board of Special Inquiry was appealed to the Board of Review in Washington, D.C. during which time the appellant remained in Canada. The Board of Review in Washington, D.C. sustained the excluding decision upon the

sole ground that the appellant was not in possession of an Immigration visa. The charge of moral turpitude and the charge that he was a person likely to become a public charge were dismissed. The opinion of the Board of Review dated March 11, 1939, contained in "Part I" of the Immigration files read as follows:

"The remaining question is whether permission to reapply should be authorized when the alien is in possession of an appropriate visa. From the facts disclosed from the present records, should the alien obtain an Immigration visa he would be admissible to the United States. He would not be inadmissible as one coming for an immoral purpose even though then intending to resume living with Gladys Emma Estep Terpening by virtue of the Supreme Court's decision in *Hansen v. Haff*, 291 U.S. 559.

"It is recommended that the *excluding decision* be affirmed on the ground that the alien is an immigrant not in possession of an unexpired Immigration visa.

"It is further recommended that the alien be granted permission to reapply for admission when in possession of an appropriate Immigration visa."

(Italics ours)

As soon as the appellant was advised of the decision of the Board of Review he made formal application at the office of the American Consul General in Vancouver, British Columbia, for the issuance of a permanent visa. Numerous hearings were had extending over a period of several months. *As a result of the hearings the appellant was issued a permanent visa by the Consul*

on August 8, 1939, at Vancouver, and immediately made plans to return to the United States. (In the meantime, and on July 19, 1939, he had married his present and second wife, a native born citizen of the United States, and the mother of two children.)

The appellant, on the following day, which was on August 9, 1939, began to board the train at Vancouver, British Columbia, for the purpose of coming to the United States. He was intercepted at the train by Immigration officers and brought before a Board of Special Inquiry at Vancouver, British Columbia. Another series of hearings were held by the Board which lasted for a period of approximately thirty days, or until September 8, 1939, at the conclusion of which hearings the appellant was excluded from admission to the United States, this time on the ground that he was a member of the Communist Party.

Records of these hearings appear in "Part I" of the Immigration files and disclose that the only evidence that the Immigration authorities had to the effect that the appellant was a member of the Communist Party were *ex parte* statements of three witnesses, namely, Clark, Vekich, and Deskins. *The record of the hearings further discloses that the statements of these three men were produced entirely ex parte. The appellant was not given the right to confront any of the three witnesses, nor, to cross-examine them in any manner, nor to be represented by counsel.*

The appellant immediately noted an appeal from the excluding decision, and while the appeal was pending he entered the United States on January 3, 1940. The appellant's visa had not been revoked by the American Consul, but he entered the United States without inspection by the Immigration authorities. The appellant went immediately, upon entering the United States, to his home in Aberdeen, Washington, and surrendered himself to the Immigration authorities for inspection. The Immigration authorities did not confine nor immediately deport the appellant, but he was subsequently indicted for illegal entry and served a period of approximately nine months in the Federal road camp at Dupont, Fort Lewis, for illegal entry.

“Part II” of the Immigration file contains the opinion of the Board of Immigration Appeals dated September 18, 1942, rendered by the Board of Immigration Appeals during the time the appellant was confined at the Federal road camp. *The opinion of the Board of Immigration Appeals did not sustain the Board of Review's holding that the appellant was a Communist; and, in the course of its opinion, said:*

“The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three *ex parte* statements of three individuals who, it is alleged, are rivals of this alien in labor affairs of the Pacific Northwest. *The alien was not confronted with these individuals, and apparently his only means of rebutting the contents of their statements*

was by his repeated assertion that he was not a Communist and never had been. The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation of witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

(Italics ours)

The Board of Immigration Appeals held that the petitioner had entered the United States unlawfully, but gave him permission, in its ruling, to apply for suspension of his deportation. This appears on page 4 of the same ruling contained in "Part II", and reads as follows:

"ORDER:

It is ordered that the case be reopened to permit the alien to file an application under the provisions of Title 8, Code of Federal Regulations, Section 150.6 (g), for suspension of deportation. . . ."

The appellant thereupon filed his petition for suspension of deportation and after his release from the road camp further hearings were had covering the years 1943, 1944, during which time the appellant lived in Seattle with his second wife and adopted sons, working on the Seattle waterfront as a marine rigger to support them.

Attention is respectfully redirected to the fact that the only evidence that the Government produced prior to this time relating to the appellant's membership in the Communist Party was the *ex parte* statements of

the three witnesses, Clark, Vekich and Deskins. When the new series of hearings began in 1943, upon the appellant's application for suspension of deportation, the Immigration authorities were, for some reason, unable to produce the witnesses, Clark and Vekich. The only one of the three which they produced was Deskins. Upon the hearings begun in 1943 the appellant was this time permitted to be represented by counsel, and when the witness, Deskins, was produced by the Immigration authorities on July 6, 1944, he, Deskins, after much cross-examination, recanted his affidavit that appellant was a Communist, and testified as follows: (See Part IV of Immigration files relative to the examination conducted July 6, 1944, page 151.)

“BY COUNSEL TO WITNESS: Among other things, you say, in the second to the last paragraph, ‘I am of the firm belief now that Mr. Anderson is not, as previously accused, a member or affiliated with any organization whose principles are contrary to the best interests of these United States.’

ANSWER: Well, that is exactly what I have been saying, Judge, it is my opinion now that Anderson is not and at the time the statement was given there he was not at that time a member of any organization advocating the overthrow of the Government.

QUESTION: By that you mean that he was not a member of the Communist Party at the time?

ANSWER: Yes.

QUESTION: Or at any time since that time?

ANSWER: Yes.

QUESTION: And your testimony further is, if I understand you clearly, Mr. Deskins, that you have no positive proof or evidence that he was a Communist. Is that true?

ANSWER: Definitely, I have no positive proof, no.

QUESTION: Did you ever see him advocate, write any articles or anything of that character over his signature advocating the overthrow of the Government by force of arms?

ANSWER: No, definitely not. As I have said previously, these meetings which I attended as a member of the Communist Party and which I presumed to be closed meetings of the Communist Party, at that time almost all of the discussions pertained mostly to local matters in the Grays Harbor county, and we were having conflict within the Union for control, and that was almost the entire nature of these meetings."

The Immigration authorities produced five witnesses at the 1943-44 hearings, namely Shanley, Davenport, Gillespie, Penning and Lant. Transcript of their testimony may be found in Part VI of Immigration files. Shanley testified, under examination by the Immigration inspector, that he was a citizen of the United States, married and a logger by occupation, employed by McCorkle Brothers, Raymond, Washington, and that he knew the appellant in 1937. (page 35). He then testified that he did not know whether the appellant was a member of the Communist Party, but that he, the witness, saw Anderson at one meeting where "I feel sure that only members were present". (page 36) He

testified on cross-examination, however, as follows:
(page 39)

Q. Was anything said at that meeting that evening with the idea, to the effect rather, of overthrowing the United States Government by force of arms?

A. At that meeting?

Q. Yes.

A. No.

Q. Was there anything said there about printing any books or pamphlets advocating the overthrow of the United States Government?

A. Not at that meeting that I can recollect.

* * * *

Q. In other words, they were discussing the conditions that prevailed in the International Woodworkers of America?

A. Yes.

Q. Did the petitioner, William Anderson, attend any other meetings except this one you have mentioned?

A. No, not to my recollection.

Q. That is the only one?

A. Yes. the only one. (page 41)

Q. You never heard any statements made by Mr. Anderson in any of the meetings of the International Woodworkers of America that were un-American?

A. No.

The witness, Charles Arthur Davenport, began testimony on page 46. He testified that he was a millworker by occupation and was employed by the Hart Mill Company in Raymond, and that he had been a member of the Communist Party from 1937 to 1938. He further testified that he knew the appellant in Raymond through the activities of the union. (page 46) He testified that he had seen the appellant at one Communist meeting, but on cross-examination by counsel testified as follows: (beginning page 51)

Q. As I understand your testimony on direct examination, it was to the effect that you do not know whether Mr. Anderson was a Communist or not or whether he belonged to the Communist Party or not?

A. No. I don't.

Q. You never heard that he belonged to the Communist Party?

A. I might have heard it. I heard that about lots of people.

Q. But you had no personal knowledge of it?

A. I did not.

* * * *

(Beginning on page 52):

Q. Did you at any time ever personally hear Mr. Anderson advocate the overthrow or destruction of the American Government by force or violence?

A. I did not.

Q. Did you ever hear of him having advocated such a policy either publicly or privately?

A. No, sir.

* * * *

Q. On the contrary, his general reputation throughout that entire district was one of being a peaceful, law-abiding citizen?

A. To my knowledge, yes.

Q. Furthermore, to your own personal knowledge, that was the general reputation he enjoyed in that extensive territory?

A. As far as I know.

(Page 53)

Q. I am not going quite so far as to hate, I mean to dislike.

A. As far as personalities are concerned, I never cared for Mr. Anderson nor he for me.

(Page 55)

Q. Mr. Davenport, did you ever, in talking with Mr. Anderson, hear him say anything which would lead you to believe that he was a member of the Communist Party?

A. No, I never did.

The third witness produced by the Immigration authorities was Vilas Gray Lant, whose testimony begins on page 58. He stated that he resided in Aberdeen and worked as a carriage rider in a lumber mill. He testified (on page 59) that he recalled attending two open meetings where the appellant was present at Aberdeen. On cross-examination, however, this witness testified as follows, beginning on page 67:

Q. Did you ever hear Mr. Anderson advocate the overthrow of the United States Government by force of arms?

A. No, I never did.

Q. Did you ever know of Mr. Anderson, or ever hear of him being accused of having written any articles, papers in which he advocated the overthrow of the United States Government by force of arms?

A. No, I can't say as to that.

Q. In this meeting that you attended of the Communist Party was there anything stated there in that meeting advocating the overthrow of the United States Government by force of arms?

A. No.

Q. Was there anything written, published, pamphlets in which they advocated the overthrow of the United States Government by force of arms?

A. Not that I recall.

The Immigration authorities then produced Ward Penning as a witness. His testimony begins on page 184. He testified that he was a citizen of the United States and a resident of Aberdeen, Washington, and had known Anderson since 1937. He testified on page 185 that he had seen Anderson in company with men whom he believed to be Communists. This witness testified that he at no time had any personal knowledge that Anderson was a Communist, and under cross-examination, on page 186, testified as follows:

Q. Did you ever hear Mr. Anderson advocate the overthrow of the United States Government by force of arms?

A. No.

Q. Did you ever know of him printing any articles in which he advocated the overthrow of the United States Government by force of arms?

A. I can't say that I did.

It further appeared, under cross-examination on page 187, that this witness had some feeling against the appellant for personal reasons. He testified that he, the witness, had been employed by the Department of Labor and Industries but had been discharged, and under questioning said:

Q. Did you have any feeling against Mr. Anderson thinking that he was at the bottom of that?

A. I know of one case when I was working for the government where Mr. Anderson took a personal stand against me. When I was an enumerator for the government he objected to my being employed as such.

Q. Was it for the Department of Labor and Industries?

A. No, for the government. I was employed as enumerator for the last census. I was informed that Mr. Anderson protested my employment.

Q. When was that?

A. 1940.

Under cross-examination, on page 189, speaking of the activities of Anderson in the Union, the witness testified as follows:

Q. Did you ever hear him advocate anything un-American all those years that he was Secretary?

A. Not that I know of.

The fifth and last witness produced by the Immigration authorities was John B. Gillespie, whose testimony begins on page 190. He testified that he was a resident of Aberdeen, Washington, and was Captain of the Police Department in the city of Aberdeen and a citizen of the United States, and had been acquainted with Anderson for five or six years. The witness testified as follows, under cross-examination, page 192:

Q. In your statement you said: "He (Mr. Gillespie) further stated that while he believes that Anderson is a member, or has been a member of the Communist Party in Aberdeen, he has no definite knowledge or proof that such is the case." Is that correct?

A. Yes, sir, that's right; that was the general talk here in Aberdeen.

This witness further testified on page 193:

Q. Mr. Anderson never did give the Police Department any trouble?

A. No, sir, he didn't.

On July 25, 1944, the Seattle Immigration Inspector Gates made "Findings of Fact and Conclusions of Law" proposing that appellant's application for suspension of deportation be denied. Inspector Gates reaffirmed his opinion on May 9, 1945, and on August 24, 1945, the matter was argued before the Board of Immigration Appeals in Washington, D.C. *No action on the case was taken by the Board of Immigration Appeals from August 24, 1945, until January 4, 1948.* During that time

the appellant remained in Seattle with his wife, and boys, and led an entirely normal life working at his trade as a barber. *Apparently the Board of Immigration Appeals did not find that the appellant was a serious enough menace to decide the case in any reasonable length of time.*

We now invite attention to the opinion of the Board of Immigration Appeals contained in "Part VI" and bearing date of January 5, 1948. After a review of the facts of the case, the opinion, on page four, states the following:

"The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the board of special inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America and that the Communist Party of America advocated and distributed literature advocating the overthrow of the Government by force or violence. See *Matter of Miguez*, 56019/547 (October 1, 1943); *Matter of Soto-Quintana*, 6388210 (Jan. 13, 1947); cf. *Doskaloff v. Zurbrick*, 103 F. (2d) 579 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited in our review to the evidence taken by the board of special inquiry at Vancouver at the hearings beginning on August 9, 1942, and terminating on September 6, 1942, and only that evidence. We shall not set forth the voluminous evidence developed by the board of special inquiry on these issues. *We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D) Clark (Ex. F of Ex. D) and Cekisch (Ex. G of Ex.*

D), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America. Again, the board of special inquiry was warranted in finding, on the basis of Exhibits L-P that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force or violence. The second lodged charge is therefore sustained." (Italics ours)

Pursuant to the opinion just above quoted, A. R. Mackay, Chief, Exclusion and Expulsion Section, Immigration and Naturalization Service, issued a warrant of deportation commanding that appellant be deported to Canada on the charges and on the grounds set forth in the order of the Board of Immigration Appeals, and thereafter and on March 12, 1948, appellant, through his present counsel, made application for stay of deportation on the ground that the appellant's physical condition was such as would result in the impairment of his health, which application was denied. Thereafter and on May 7, 1948, appellant requested a reopening of the proceedings to permit appellant to present additional evidence showing that appellant had adopted the two minor children of his wife and that his deportation would result in serious economic detriment to them, which application was denied by the Board of Immigration Appeals June 9, 1948.

Thereafter, and on the 7th day of September, 1948, the appellant sued out of a writ of *habeas corpus* in the District Court for the Western District of Washington. Hearing upon the writ was had on July 19, 1949, at which time the testimony appearing in the T.R. 40 to 92, inclusive, was taken.

The Court then took the matter under advisement until November 4, 1949, at which time it announced its oral decision dismissing the writ and continuing the case for the purpose of giving further reasons for its decision (T.R. 96). On December 14, 1949, the District Court rendered another oral opinion, again dismissing the writ. Thereafter and while the Court had proposed Findings, Conclusions and Judgment under consideration, the appellant, on March 17, 1950, filed a motion for reconsideration and for judgment notwithstanding the oral decision of the court, such motion being based upon the decision of the United States Supreme Court on February 20, 1950, in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33 (T.R. 15 and 109). This motion, after further argument, was denied on June 22, 1950 (T.R. 109). Thereafter and on July 27, 1950, the Court signed Findings, Conclusions and Judgment, dismissing the writ. This appeal results.

ASSIGNMENTS OF ERROR

The Court erred:

1. In making its oral decision on November 4, 1949,

denying the petitioner's petition for Writ of Habeas Corpus.

2. In reaffirming such oral decision of November 4, 1949, by subsequent oral decision on December 14, 1949.

3. In making its oral decisions of November 4, 1949, and December 14, 1949, without granting counsel for the petitioner an opportunity to present oral argument.

4. In making its oral decision of June 22, 1940, denying the petitioner's motion for reconsideration and reaffirming its prior oral decisions of November 4, 1949, and December 14, 1949.

5. In holding that compliance with the Administrative Procedures Act of June 11, 1946, by the Immigration Authorities, with regard to proceedings taken by them in a petitioner's case after its enactment was and is not required under the holding of the Supreme Court of the United States in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33.

6. In holding that the Immigration Authorities did not abuse their discretion in ordering the petitioner deported and that their decision in so ordering him deported was supported by substantial evidence.

7. In holding that the Court's scope of review in deportation cases was not broadened by *Wong Yang Sung* case *supra*.

8. In holding that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Yanish*,

et al. v. Barber, etc. (9 Cir.) 181 F. 2d 492, was not applicable to the instant case.

9. In making and entering paragraphs I to III, inclusive, of its Conclusions of Law.

10. In making and entering its Judgment herein, denying the petitioner's application for Writ of Habeas Corpus as prayed for and in discharging the petitioner's rule to show cause on July 27, 1950.

SUMMARY OF ARGUMENT

1. The court rendered its oral decisions denying the writ of habeas corpus on November 4, 1949 and December 14, 1949, without giving the appellant's counsel an opportunity for oral argument and the appellant's counsel was thus denied the privilege of making a full and adequate presentation of appellant's case.

2. The opinion of the Board of Immigration Appeals of July 5, 1948, which finally excluded the appellant and ordered his deportation was based, by its own terms, upon the *ex parte* statements of witnesses given in 1939, which the Board, in its previous opinion in 1942, discarded as not an "adequate procedure."

3. Proceedings were had before Immigration tribunals after the passage and effective date of the Administrative Procedures Act which were not in accordance with requirements of the Act.

ARGUMENT

1. Court's Failure to Permit Oral Argument

On July 19, 1949, after the first hearing upon the writ of habeas corpus, the matter was concluded by the following statement of the District Court (T.R. 94):

“This matter is adjourned subject to call. In other words, it is understood that before I render an opinion I am going to call counsel in for the purpose of *asking at least argument on those phases that I feel I need help upon.*” (Italics ours)

No further proceedings were had until November 4, 1949, when both counsel appeared in court at the court's request. Without giving counsel for the appellant an opportunity to argue the case the court proceeded to render its oral opinion, denying the writ (T.R. 94). A second oral opinion was given by the District Court on December 14, 1949 (T.R. 97) and again no oral argument was permitted. In fact, counsel had no time to even request permission to argue the case because the court began giving its oral opinion in the exact manner as indicated by the transcript (T.R. 97 to 108). It is conceded that oral argument was permitted upon the motion for reconsideration but that was after the decision of the court, denying the writ, had been given and the mind of the court had obviously become crystallized upon the subject. It is submitted that it was the duty of the District Court to hear counsel before making up its mind and rendering the oral opinion and that failure of the District Court to give counsel the opportunity

which it had indicated counsel would be given, is reversible error.

2. The Board's Opinion of January 5, 1948, Based Upon Ex Parte Affidavits

The opinion of the Board of Immigration Appeals rendered on January 5, 1948, was, by its own terms, based upon the *ex parte* statements given by the witnesses Deskins, Clark and "Cekisch" (probably Vekich), and upon the appellant's testimony given before the American Consul.

We have already quoted a portion of the Board's opinion but for the convenience of the Court, we quote the following excerpt:

"We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D) Clerk (Ex. F of Ex. D) and Cekisch (Ex. G of Ex. D), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America."

The statements referred to above by the Board of Immigration Appeals were the ex parte statements which the Board itself had already condemned in its opinion in 1942 when it said:

"The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three *ex parte* statements of three individuals who, it is alleged, are rivals of this alien in labor affairs of the Pacific Northwest. *The alien was not con-*

fronted with these individuals, and apparently his only means of rebutting the contents of their statements was by his repeated assertion that he was not a Communist and never had been. The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation by witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case." (Italics ours)

Thus we have, in short, this situation. *The Board of Immigration Appeals' opinion of January 5, 1948 is based upon evidence that the Board condemned in 1942.*

The Board of Immigration Appeals refers in its opinion above quoted to the appellant's statement before the American Consul in Vancouver, which statements, Exhibit B of Government Exhibit D were given by appellant *at the time he requested and obtained from the American Consul, a visa.* There is nothing unfavorable in these statements, obviously, since the American Consul thought enough of them to issue the appellant a visa on the basis of them.

We, therefore, see from a careful analysis of the reasons given by the Board of Immigration Appeals for its holding that the appellant was a Communist, that they have no valid reasons at all, and *their whole opinion is based upon the 1939 ex parte statements which were discarded in 1942 by the Board itself.*

From the foregoing analysis of the evidence in this case and the opinion of the Board of Immigration Ap-

peals, it is clear that the order of deportation is based solely upon suspicion. In this regard the case of the *United States ex rel. Kettunen v. Reimer*, 79 F. (2d) 315, is in point. In this case the Immigration authorities sought to deport one Pauli Olavi Kettunen, a Finn, on the ground that Kettunen was a member of the Communist Party. The evidence showed that Kettunen attended a Communist meeting in 1932 in Duluth held in the rooms of the Finnish Workers Club in that city, and that he filled out and signed a blank application for membership, which he turned over to the local secretary at the party headquarters in Minneapolis. The facts also disclosed that he "probably" paid the initiation fee, but that his application was held in abeyance. He did sell a newspaper described as the "Daily Worker," an official organ of the Communist Party. There is really much stronger evidence unfavorable to Kettunen in the *Kettunen* case than to the appellant in the instant case, because in the instant case the appellant at no time made application for membership in the Communist Party, but merely was seen at meetings. In discussing this phase of the case, Judge Chase, speaking for the court, said:

"In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary. It is enough for present purposes to hold that it is not proved unless the alien is shown to have so conducted himself that he has brought about a status of mutual

recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. *He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.* So tested we cannot agree that there was evidence to establish that this relator was affiliated with the Communist Party. His application for membership would indicate his then sympathy with its aims, but his reconsideration and failure to join show his unwillingness to let his sympathy control his actions, *and there is no proof which shows any mutual recognition that co-operation was to be expected from him.* In *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707 (C.C.A.2) and *Wolck v. Weedin*, 58 F. (2d) 928 (C.C.A.9) active cooperation with the Communist Party was shown to support the charge of affiliation, and Yokinen had been a member of that party." (Italics ours)

Certainly in view of the foregoing language of the court and the evidence in the instant case, the Board of Immigration Appeals was entirely *unjustified* in holding that the appellant was a member of or affiliated with the Communist Party.

We fully appreciate the fact that the appellant entered the United States in 1940 without reporting to the Immigration authorities. However, the entire point of this proceeding is that by reason of the fact that the

Immigration held the appellant was subject to deportation for being a Communist under the Act of October 16, 1918, he is not eligible for the suspension of deportation which the Immigration has already given him permission to apply for. There is therefore no question at all but that the appellant's deportation would be suspended were it not for the holding of the Board of Immigration Appeals regarding Communism. In their opinion of January 5, 1948, contained in "Part VI" of the record, page 6, the following appears:

"Section 19(d) of the Act of February 5, 1917, as amended, provides in part that aliens subject to deportation under the Act of October 16, 1918, as amended, are not eligible for suspension of deportation. We have found respondent subject to deportation under this Act. *For that reason alone we cannot suspend his deportation.* An order of deportation will be entered." (Italics ours)

So we see that the only thing that would keep the appellant from continuing to live in the country of his birth and supporting his wife and two children here is the holding of the Board of Immigration Appeals that he is a Communist. This holding, as we have pointed out, is entirely unjustified and unsupported by the evidence.

This case shows, on the whole, an entire disregard of vital human rights by the Immigration authorities. When the appellant was originally denied admission in 1939 it was without cause or provocation, and ever since that time he has been the subject of constant persecu-

tion by the Immigration Service. His persecution has continued over a period of almost ten years, during which time not one unfavorable bit of evidence has been introduced against the appellant. The opinion of the Board of Immigration Appeals of January 5, 1948, states in its own words, that it finds the appellant a Communist on a basis of the *ex parte* affidavits introduced in 1939, which were discredited by the Service itself. Such an opinion cannot in justice, fairness and law be allowed to stand.

We again invite the court's particular attention to that portion of the opinion of the Board of Immigration Appeals in 1942, found in "Part II," where they said:

"The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel, nor the right of confrontation of witnesses and the alien's cross-examination of adverse witnesses. Thus it is not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

Yet, in its opinion of January 5, 1948, the same Board of Immigration Appeals based its opinion upon evidence that it had already declared was obtained by "not a wholly adequate procedure to determine such a disputed factual issue as is presented in this case."

The District Court in its oral decision (T.R. 94 to 108) completely ignored the above questions. We believe that the court failed in a thorough analysis of the

case because it did not have the benefit of an oral argument.

3. Proceedings Had Subsequent to the Effective Date of the Administrative Procedures Act

The Administrative Procedures Act was approved June 11, 1946. This case was argued before the Board of Immigration Appeals on August 24, 1945. However, the Board of Immigration Appeals had the case under consideration from the date of argument until January 5, 1948. *Therefore, it is clear that the Act was in effect during much of the time that the Board was taking proceedings in the case, and at the time its decision was rendered.* With reference to cases on appeal, the Act provides:

“(b) SUBMITTALS AND DECISIONS.—Prior to *each* recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers *the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each finding, conclusion, or exception presented.* All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.” (Italics ours)

Let us now see whether this portion of the Act was complied with.

The Act says that the "parties" shall be afforded a "reasonable opportunity to submit for consideration of the officers participating in such decisions" proposed findings and exceptions, together with supporting reasons. *No such opportunity was afforded the appellant in this case.*

The Act also says that the record shall show the ruling upon "each such finding, conclusions, or exception presented." *The record does not so show in this case.*

The Act says that all decisions shall include, "a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law." *The decisions are not so written in this case.*

Under "Adjudication" the Act provides:

"Sec. 5. In *every case* of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS—*The same officers who preside at the reception of evidence pursuant to section 7 shall make recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or*

agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.” (Italics ours)

On March 12, 1948, the appellant made application for stay of deportation. This application was denied without compliance with the Act, and in fact, without even granting a hearing. On May 7, 1948, the appellant requested a re-opening for the purpose of introducing additional testimony. This was likewise denied without compliance with the terms of the Act and without a hearing.

The provisions of the Administrative Procedures Act that “No procedural requirements shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement,” is so vague as to be completely meaningless. Evidently, this was the opinion of the Circuit Court in the Yanish case decided April 24, when it said:

“It appears that since the decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33, holding the Administrative Procedure Act applicable to deportation proceedings, the regulations of the Department in respect of such proceedings have been amended to conform to that decision. Consult Federal Register, Vol. 15, No. 47, pp. 1298-1302. *These regulations,*

as we understand them, are applicable to proceedings inaugurated prior as well as subsequent to the effective date of the Administrative Procedure Act, no exceptions appearing therein.” (Italics ours)

Reference to the regulations referred to shows that they directed immediate compliance with the Administrative Procedures Act *without excepting* cases where the warrant of arrest was obtained prior to the effective date of the Act. The rules and regulations referred to conclude as follows:

“This order shall become effective on the date of its publication in the Federal Register. It is necessary to supersede regulations relating to deportation procedure in Part 150 of Title 8 of the Code of Federal Regulations with new regulations to conform to the Supreme Court decision in the case of *Wong Yang Sung* (No. 154—October term, 1949) rendered on February 20, 1950. Since February 20, 1950, *all deportation hearings have been suspended*. The regulations set forth in this order are promulgated to conform to the principles enunciated in the above-mentioned court decisions and deportation hearings cannot be resumed until the regulations contained in this order become effective. Therefore, compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date is impracticable because the due and timely execution of the functions of the Immigration and Naturalization Service with respect to the conduct of deportation hear-

ings would be impeded and public interest would not be served by notice and delayed effective date.

(SEAL)

WATSON B. MILLER,
*Comissioner of
Immigration and
Naturalization.*

Approved: March 8, 1950

J. HOWARD McGRATH,
Attorney General.”

SUMMARY AND CONCLUSION

In conclusion we invite attention to the witnesses furnished by the appellant who testified unequivocally in his favor. See the Immigration file relating to the appellant's hearing upon his petition for suspension of deportation in 1943 and 1944. The testimony of State Senator Frank L. Morgan, page 73; Rege Inman, page 82; Leonard Cochennett, page 90; State Representative Charles R. Savage, page 101; Denee Dyer, page 108; Ted Dokter, page 117; William R. McDonald, page 130; Harvey Nelson, page 138; Ray De Kraay, page 140; Clarence J. Williams, page 157; Howard F. Anderson, Scout Executive, page 158.

All of the foregoing were American citizens whose testimony stands unimpeached. The Immigration authorities entirely disregarded the testimony of these many witnesses. The District Court made the following observation in one of its oral decisions (T.R. 104):

“Some of the witnesses who appeared for the petitioner may well have aroused considerable doubt in the Board of Inquiry as to their sincerity. It is unnecessary to name names but there was more than one whose endorsement would by some persons be viewed as the deserved ‘kiss of death.’ I may say that I have a high regard for Senator Morgan, now deceased. I have no reason to believe that the Board of Inquiry did not share that high regard.”

The foregoing statement of the District Court is somewhat amazing in that there is not a shred of testi-

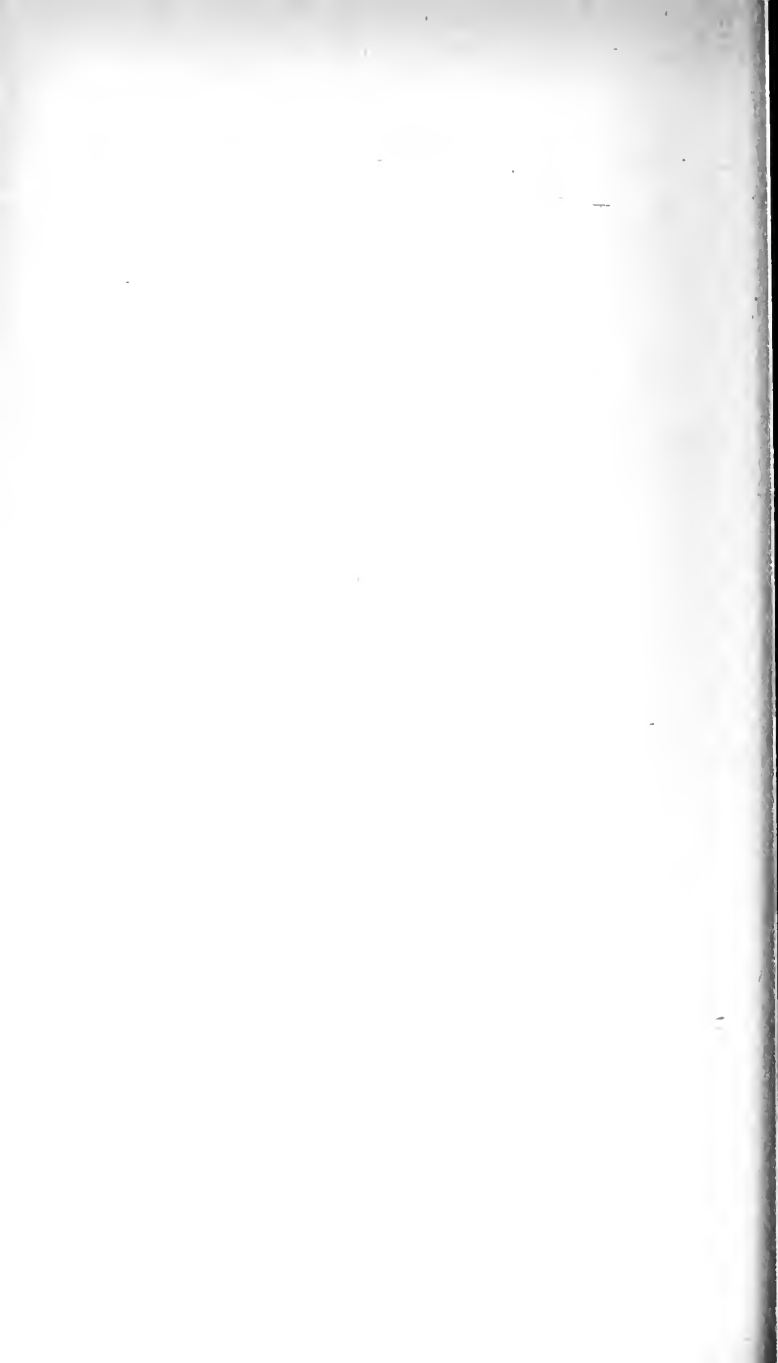
mony in the record which in any way impeaches the integrity and patriotism of any of the witnesses. It would seem that the District Court's attitude regarding the testimony only goes further to show its preconceived opinion as first evidenced by its lack of desire to hear oral argument of appellant's counsel.

The appellant was wrongfully prevented from returning to the United States from Canada in 1939 as determined by the Immigration authorities themselves that same year when the action of the border inspectors was reversed and the appellant was given specific permission by the Central Office in Washington to apply for a visa. Then when the appellant did exactly as the Central Office suggested that he might do and obtained a visa from the American Consul in Vancouver, he was again, and without any further reason, prevented from returning to his home in the United States by the same border officers. This second time he was prevented from returning on a basis of *ex parte* affidavits which the Board of Immigration Appeals later and in 1942 held to be insufficient and held that the hearing was unfair and it specifically gave the appellant permission to apply for suspension of deportation. Several years after the application for suspension was made, the Board of Review, apparently having forgotten what it said about the *ex parte* affidavits and the fact that it had held them improper and the hearing unfair, based an excluding decision upon the very self same affidavits.

Certainly such a manner of handling a case is grossly unfair and is not in keeping with the dignity and justice which should be characteristic of every branch of this Government. For these reasons a writ of habeas corpus should have been granted as prayed for.

Respectfully submitted,

EDWARDS E. MERGES,
Attorney for Appellant.



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM EWALD ANDERSON,
Appellant,
vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization,
for the Seattle District,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

APPELLEE'S BRIEF

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON



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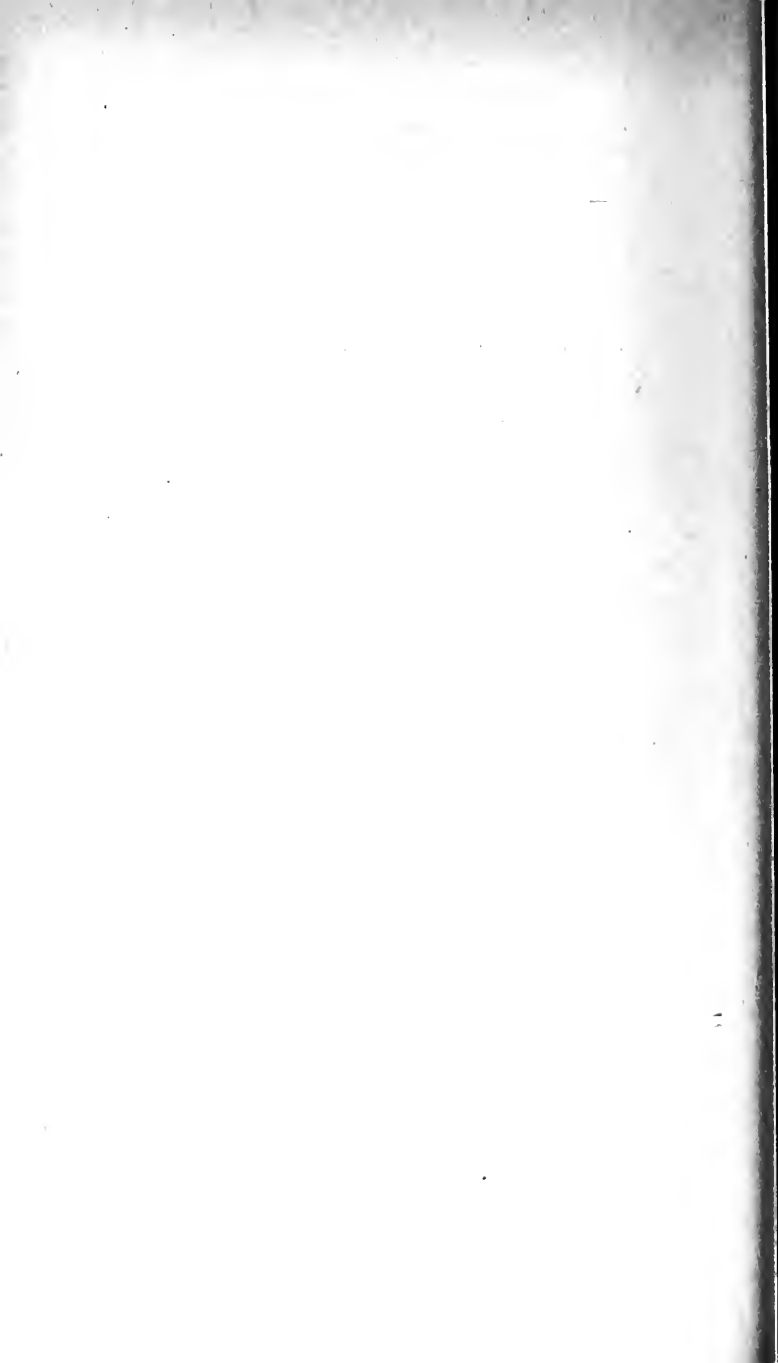
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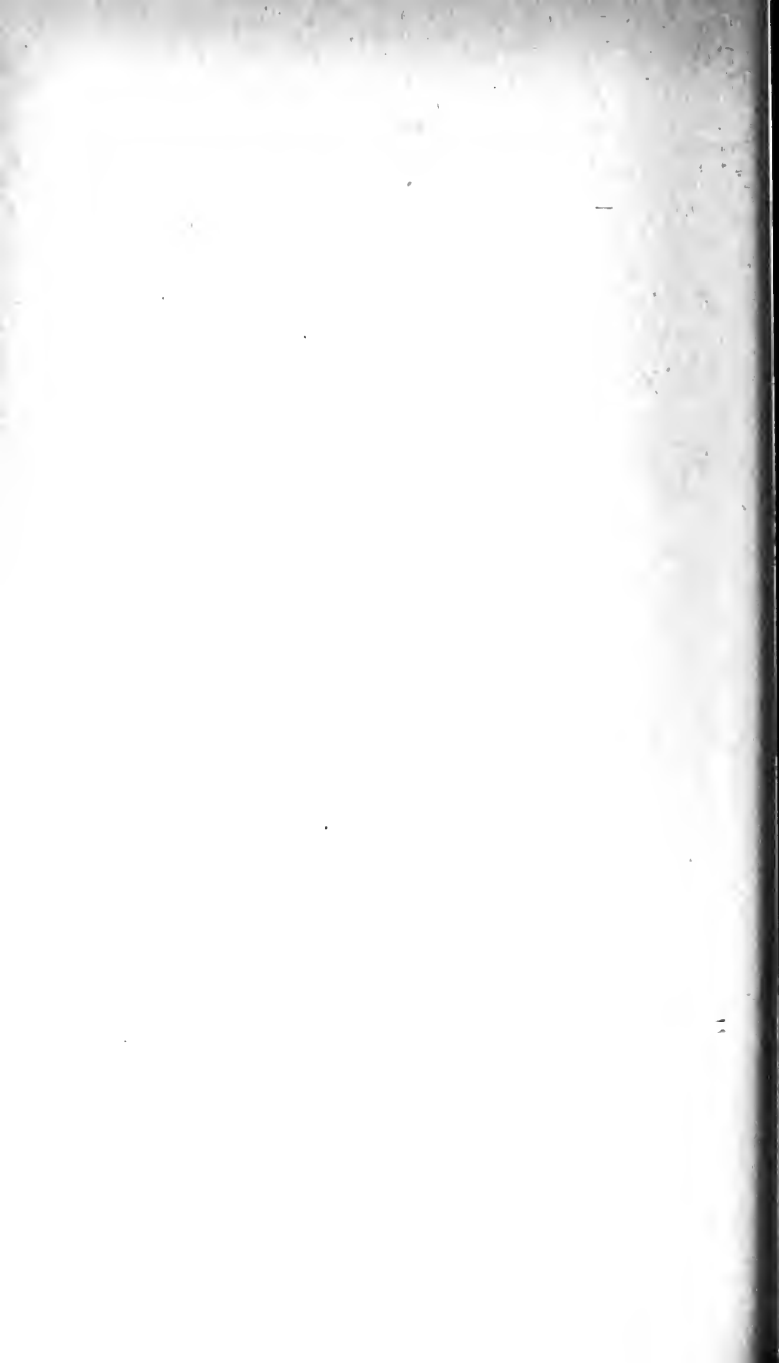
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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

APPELLEE'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from an order and judgment of the District Court for the Western District of Washington, Northern Division denying a writ of habeas corpus in a deportation proceeding, entered on the 27th day of July, 1950 (R. 32).

Notice of appeal was filed and served September 18, 1950 (R. 33) and cost bond on appeal with General Casualty Company of America, as surety, was filed the same day.

Appellant has correctly set forth the statutes giving the District Court jurisdiction to hear and determine the issues as well as this court's jurisdiction of the appeal.

STATEMENT OF THE CASE

Appellant has fully covered this phase in his opening brief, and we have nothing further to add.

POINTS ON APPEAL

Save and except the points covering what the court found as facts in its written findings, conclusions and judgment, the other points refer to the court's three oral decisions which have no particular bearing on the case except to more fully explain the written findings of fact, conclusions of law and judgment.

It would seem that the only matters to be reviewed on this appeal are:

- (a) Whether the court erred in denying the appellant's application for a writ of habeas corpus.
- (b) Whether the Administrative Procedure

Act is applicable to proceedings had prior to the effective date of that Act.

- (c) The effect of the decision by the United States Supreme Court, in the Wong Yang Sung case on the proceedings in this case.
- (d) The effect of this court's decision in the Yanish case on the proceedings here.

THE EVIDENCE

The evidence on behalf of appellant on whom the burden rested to show that the decision of the Board of Immigration Appeals was erroneous and that appellant was not accorded a fair hearing did not measure up to that required in a habeas corpus proceeding. In support of the application for the writ appellant testified (R. 40-72), but there is not one syllable of testimony bearing on or from which it could possibly be inferred that appellant was denied any right to which he was entitled, in fact he was at all times represented by capable and competent counsel, as the record so clearly shows (R. 75).

In support of his return and answer to the order to show cause and application (R. 7) appellee in paragraph IV of the answer alleged:

"Answering paragraph IV of the petition the respondent avers that at the hearings held by the Immigration authorities the foregoing facts

detailed herein affirmatively appeared, and that it further appeared that the petitioner was a member of the Communist Party. The respondent avers that it further appeared affirmatively from the records and files herein that the hearings were conducted in accordance with the law as applied to such matters and that in ordering the petitioner deported the Immigration officials have not abused their discretion.

The respondent further avers that the finding of the Immigration authorities that the petitioner was a communist or a member of the Communist Party is based upon reasonable evidence or fact, and that the testimony and exhibits at said hearing corroborate the fact that the petitioner was a member of the Communist Party, and that under the rules of evidence as set forth in the Rules of Evidence in the United States Courts in such cases there is substantial evidence in support thereof. The respondent admits that the petitioner is American-born and avers that under the laws of the United States and the decisions of the courts of the United States said order of deportation is made after a proper and lawful hearing and that the ground that the petitioner was a communist is not based upon suspicion or conjecture, and that the Immigration Officers in ordering petitioner deported have not abused their discretion, and that the petitioner has had a fair trial." (R. 9-10).

In support of this answer the appellee attached to and made a part of his answer and return to the order to show cause the several files of the Immigration Service, duly certified and containing the entire record of the proceedings had by the Immigration Service (R. 12 — par. V of return).

This voluminous record was carefully read and considered by the trial judge (R. 17-97) and on November 4, 1949, the court orally announced its decision denying the writ. The court there said that at a later date "some of the reasons which appealed to the court as supporting such decision would be stated" (R. 17).

The court further stated orally on June 22, 1950 that on December 4, 1949, the court rendered its oral decision. In that oral decision of June 22, 1950 the court further said:

"After findings of fact, conclusions of law and decree were presented for entry and while the court was considering certain proposed changes as to the findings of fact, the petitioner on March 17, 1950 and after the decision of February 20, 1950, of the United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33, filed a motion asking the court for a reconsideration of the entire record and for the granting of the writ of habeas corpus notwithstanding such oral decision of the court.

Respective counsel were accorded full opportunity to and did argue every phase of the entire matter from the inception as they desired.

While counsel for petitioner in connection with such motion filed March 17, 1950, strongly insisted that the Administrative Procedure Act of June 11, 1946, 5 U.S.C.A., Sec. 1001, et seq., had not been complied with as to petitioner and urged that under such act petitioner was entitled to the writ prayed for it should be noted that never prior to March 17, 1950, had peti-

tioner in any way argued or even indicated that said act was in the slightest degree or at all applicable to the proceedings involving him.

This court notwithstanding the lateness of petitioner's suggestion again carefully examined the entire record, files, exhibits and evidence with respect to whether or not the Administrative Procedure Act related thereto in whole, as claimed by petitioner, or at all.

After such careful consideration and reexamination of every aspect of the matter the court is still of the opinion that the previously announced denial was correct.

Petitioner since such tardy suggestion has argued that all of the many hearings held between 1939 and 1945 before the Administrative Procedure Act was ever enacted, as well as long before any effective date of that act, which as to the appointment of examiners was June 11, 1947, Section 1011 should be set aside because not in compliance with an Act that did not then exist.

Plainly the Act does not apply to the hearings had before its enactment.

No hearings were had after it was passed. And it does not appear that the petitioner would have had any rights under the Act as to anything since its enactment that he was not afforded. But even if he would have been entitled to some technical right under the Act after its enactment had he or his counsel timely asked the Immigration authorities for such, he should not now be able to successfully complain.

To approve the position of counsel for petitioner beginning in March, 1950 would establish a precedent hazardous in the extreme.

This Administrative Procedure Act because of

the subsequent time of its enactment, because of the subsequent effective date therein stated, and because of the specific language of the Act, did not apply to the proceedings before the Immigration authorities as to this petitioner. Aside from that petitioner represented all the while by experienced counsel, waived any right to object to the procedure followed.

I can find no basis, either legally or equitably, for the issuance of the writ of habeas corpus sought. Every sentimental ground for granting relief to him is based upon an occurrence happening after the Immigration authorities had declared their opposition to his reentry into the United States and would be a solicitation to others to insincerely copy his course as a helpful strategy.

For the reasons, among others, orally stated by me on December 14, 1949, I am satisfied and find that the Immigration Authorities were acting within the scope of their powers, that they were neither arbitrary or capricious nor acting in abuse of their discretion, and that the evidence presented to them was ample to justify the conclusion they reached.

Moreover, based on the record and under the law, I am further satisfied and further find that their actions, findings and conclusions were not contrary to the law or the Constitution; that they were supported by substantial evidence and moreover were supported by the facts to the extent that the facts were or are subject to trial de novo by any reviewing court. And finally I find that there was no prejudicial error.

If there were any errors on the part of the Immigration authorities, such favored petitioner and in no wise constituted prejudicial error. It must be remembered that he wilfully and unlaw-

fully entered the United States early in 1940 and that he is still here and at liberty in spite of the efforts of the Immigration authorities to return him to the country from whence he unlawfully came so many years ago.

His conviction for wilful illegal entry established beyond all reasonable doubt that his entry then was wilful and illegal. Such is *res judicata* between the government and the petitioner. Having come to this country wilfully and unlawfully over ten years ago he has therefore never since had a lawful right to remain here. I have no legal or conscientious ground to interfere with the decision of the Immigration authorities that he should be deported. Neither the recent Supreme Court decision of *Wong Yang Sung v. McGrath*, 339 U.S. 33, *supra*, and 339 U.S. 908 per curiam modification, nor the per curiam decision of April 24, 1950, in the cause of *Yanish, et all v. Barber, etc.* (9 Cir.) 181 F (2d), 492, apply to petitioner's situation under the record here involved.

The distinctions between them and the instant case are definite and clear. In each of them, contrasted with the situation here, the hearings before the Immigration authorities in question were long after the effective date of the Administration Procedure Act. In each of them contrasted with the situation here, the one sought to be deported made timely and appropriate demand for compliance with the Act. See *Wong Yang Sung* case, 80 F. Supp. 235 and 174 F. (2d) 158, and Judge Harris' opinion in the *Yanish* case, 81 F. Supp. 499 and 86 F. Supp. 461 (*Yanish* case — Judge Erskine) for matters preceding the decision of Judge Harris. And in each of them contrasted with the situation here, there was apparently a lawful entry.

Such motion is overruled and such petition of William Ewald Anderson is, of course, again denied.

The foregoing transcript of oral opinion herein of June 22, 1950, is approved June 23, 1950.

LLOYD L. BLACK,
U. S. District Judge."

(R 17-21)

ARGUMENT IN ANSWER TO APPELLANT

We might well stop here and submit this filed oral opinion of the late Judge Black as our argument in support of the judgment but are prompted to go further in view of the action of the Congress in taking note of the decision of the United States Supreme Court in the Wong Yang Sung cases, *supra*.

In the *Supplemental Appropriation Act 1951* (U.S. Code Congressional Service No. 10, 81st Congress 2d Session) we find this at p. 3798: Public Law 843:

"General Provisions — Department of Justice

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007)."

The sections which the Congress mentions deal with the subjects of adjudications, hearings and the manner in which they shall be conducted, burden of

proof, evidence, record and basis for decision, initial decisions, conclusiveness, review, etc.

Prior to the Supreme Court's decision in the *Wong Yang Sung case*, supra, the District Courts and the Circuit Courts of Appeal in many of the Circuits had held that deportation proceedings were excepted from operation of Section 1006 of the Administrative Procedure Act.

Azzollini v. Watkins (2d Cir.) 172 F. (2d) 897.

In re U. S. ex rel Obum, 82 F. Supp. 36 affirmed 170 F. (2d) 1009;

Wong Yang Sung v. Clark, 80 F. Supp. 235, affirmed 174 F. (2d) 158, subsequently reversed in 339 U. S. 33 and now reinstated by Congress in the Supplemental Appropriation Act 1951, Public Law 843, 81st Congress, 2d Session.

The hearings had before the Immigration Service were as follows, as shown by the original record, sent to this court for the purposes of this appeal:

1. First hearing before Board of Special Inquiry at Vancouver, B. C., August 8, 1939.

2. An appeal from the order of exclusion was taken by appellant.

3. While that appeal was pending and before decision was made, appellant on January 3, 1940 unlawfully returned to this country from Canada

on foot, entering near Blaine, Washington, at a place other than that designated for entry and without reporting to the Immigration authorities.

4. Appellant was tried in the District Court for this unlawful entry, before a jury and convicted, being cause No. 45571, and was by the Court sentenced to 11 months in the King County Jail and fined \$500.00.

5. Appellant gave notice of appeal to this court, which was subsequently voluntarily dismissed.

6. On January 22, 1940 a warrant of deportation was issued, which was served on appellant February 19, 1940, and appellant was released on a \$500.00 bond the same day.

7. On January 22 and March 27, 1940 appellant, being represented by counsel was accorded a hearing under the warrant of arrest. The record of these hearings was forwarded to the Commissioner of Immigration and Naturalization for review and decision by the Board of Immigration Appeals.

8. On September 16, 1942, the Board of Immigration appeals rendered its decision ordering the case re-opened to permit appellant to file an application for suspension of deportation or for voluntary departure in lieu of deportation, the government to

be heard in the introduction of evidence to sustain the government's claim that appellant was a member of a class enumerated in Section 19(d) of the Act of 1917 as amended (8 U.S.C. 155) and that petitioner (appellant) be afforded full opportunity to meet and rebut such evidence. The order further providing that if the additional evidence warranted additional charges should be lodged.

9. Hearings were had October 7, 1942, November 24 and 27, 1942, December 9 and 10, 1943, July 6, 1944, and May 1, 1945. At all of these hearings appellant was represented by counsel of his own choice.

10. The entire record of these several hearings was forwarded to the Central Office, Washington, D. C. for review together with the presiding Inspector's proposed findings of fact and conclusions of law on May 9, 1945, which included petitioner's (appellant's) brief prepared by counsel of his own choice.

11. On January 5, 1948, the Board of Immigration Appeals entered its decision and ordered petitioner deported to Canada, and a warrant of deportation was issued.

12. On March 12, 1948, appellant, through his present counsel, made application for stay of deportation on the ground that petitioner's physical condi-

tion was such as would result in the impairment of his health, which request was transmitted to the Commissioner at Philadelphia who denied the request.

13. On May 17, 1948, appellant requested a reopening of the proceedings to permit him to present additional evidence to show he had adopted two minor children of his present wife, and that his deportation would result in serious economic detriment to them. This request was denied.

As will be readily seen from the foregoing, all of which is contained in the original certified record of the proceeding before the Immigration and Naturalization Service, now on file in this court pursuant to stipulation (R 37) for the transfer of exhibits to this court, no hearing or hearings on the merits, at which any evidence was taken was had after the effective date of the Administrative Procedure Act. All of the evidence was concluded more than a year prior to June 11, 1947, the effective date of the Examiner provisions of the Administrative Procedure Act (Title 5, Sec. 1006, U.S.C.), but the final decision of the Board of Immigration Appeals was not rendered for six months thereafter on, to-wit: January 5, 1948.

There is nothing in the Act itself which even indicates a Congressional intent to make it retroac-

tive. And the Act applies *only* to the conduct of the actual hearing before the administrative body, in other words, to the taking of evidence at most, and not to the review of that evidence by the Board of Immigration Appeals. Nor is there anything in the decision of the United States Supreme Court in the *Wong Yang Sung case*, *supra*, as we see it, that militates against this view.

The Administrative Act itself (Section 1011, Title 5, U.S.C.) provides in part:

“ * * * and no procedural requirement as to any agency proceeding initiated prior to the effective date of such requirement.”

ANSWER TO APPELLANT'S ARGUMENT

Counsel for appellant first argues (Br. p. 22) that the court abused its discretion in not permitting oral argument on November 4, 1949.

It was on July 19, 1949, after the first hearing upon the application for the writ of habeas corpus, that the court stated that the hearing was recessed, subject to call, and that he was going to call counsel in for the purpose, among others, of “asking at least *argument on those phases that I feel I need help upon.*”

Apparently the court felt that because all ques-

tions in the case had been thoroughly discussed and the position of both parties having been made clear to him through the several written "memoranda" filed with him, he did not need further assistance, and that he had satisfied himself on all phases of the case from the records and briefs before him. This was discretionary, and the court did not err.

Counsel lays stress upon the fact that the opinion of the Board of Immigration Appeals rendered January 5, 1948 was based upon the ex parte statements given by the witnesses Deskin, Clark and Vekich and upon appellant's testimony given before the American Consul at Vancouver, B. C.

The Board of Immigration Appeals, as appears in Part II of the certified Immigration file, on September 18, 1942 had this to say:

"The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three ex parte statements of three individuals who, it is alleged are rivals of this alien in labor affairs of the Pacific Northwest. The alien was not confronted with these individuals, and apparently his only means of rebutting the contents of their statements was by his repeated assertion that he was not a Communist and never had been.

The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation of witnesses. Thus it is not a wholly adequate pro-

cedure to determine such a disputed factual issue as is presented in this case."

It was for this reason that the Board sent the matter back to the Director for the purpose of having these witnesses brought before the Board of Special Inquiry in the *deportation proceedings*, as distinguished from the *exclusion hearings*, wherein appellant was entitled to the confrontation of witnesses, representation by counsel of his own choosing, and the right of cross-examination.

Counsel has correctly quoted from the testimony of the witness Deskins. There were other witnesses, to-wit: Shanley, Davenport, Gillespie, Penning and Laut, whom we believe the record will show, testified to facts which justified the Board of Special Inquiry to find appellant was a member of the Communist Party, and the further evidence as to what the Communist Party stands for, which justified the Board of Immigration Appeals in affirming the findings of the Board of Special Inquiry on that phase of the deportation cases, wherein, in ordering appellant's deportation, it said:

"The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the board of special inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America, and that the Communist Party of America advocated

and distributed literature advocating the overthrow of the government by force or violence. See *Matter of Miguez*, 5609/547 (October 1, 1943); *Matter of Soto Quintana*, 6388210 (Jan. 13, 1947); cf *Doskaloff v. Zurbrick*, 103 F. (2d) 579 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited in our review to the evidence taken by the board of special inquiry at Vancouver at the hearings beginning on August 9, 1942 and terminating on September 6, 1942, and only that evidence. We shall not set forth the voluminous evidence developed by the board of Special Inquiry on these issues.

We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D), Clark (Ex. F of Ex. D) and Cekish (Ex. G of Ex. D) together with respondent's statements before the American Consul at Vancouver, B. C. (Ex. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America.

Again the board of special inquiry was warranted in finding, on the basis of Exhibits L and P, that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force and violence. The second lodged charge is therefore sustained."

Counsel for appellant cites this decision in his brief and italicizes certain portions thereof. The criticism made by him in connection with the Board's previously announced decision in the *exclusion proceedings* is not justified.

The hearings held on the warrant of arrest, it will be remembered, were in the *deportation proceedings* and the remarks made by the reviewing board in its decision in the *exclusion proceedings* to the effect that ex parte affidavits were "not wholly adequate * * * to determine such a disputed factual issue as is presented in this case" was the reason that oral evidence of the several witnesses in the *deportation hearings* was taken, and at which hearings appellant was at all times represented by competent counsel of his own choice, and such counsel exercised their right of cross-examination, a privilege not granted in exclusion proceedings.

The District Court went to great length in its careful and painstaking analysis of both rulings by the reviewing board.

In habeas corpus the District Court is limited to the determination of whether from the record it is made to appear that the applicant for such writ was accorded a fair hearing, and as to whether or not, upon the record, it is made to appear that the administrative body abused its discretion or acted arbitrarily and capriciously. The trial court, in habeas corpus, cannot substitute its judgment for that of the administrative body. All it can do is make the determinations we have mentioned.

So far as the evidence of appellant's membership in the Communist Party is concerned, there was, as the administrative reviewing board found, sufficient evidence of that fact. It also found that the evidence before the department was amply sufficient to sustain the finding that the Communist Party of America had for its objects and purposes the overthrow of the American Government by force and violence.

In this latter finding the board has since been supported, after a long series of hearings conducted by both the United States Senate and House of Representatives in the preamble to Public Law 834, 81st Congress, 2d Session, passed over the President's veto, September 22, 1950 entitled "Internal Security Act of 1950," wherein inter alia it is said:

"Sec. 2—As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds:
* * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined.

Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that the overthrow of the government of the United States by force and violence may seem possible of achievement, it seeks converts far

and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments.

The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, *present a clear and present danger to the United States* and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

It is not true, as argued by appellant, that speaking of the decision of the Board of Immigration Appeals that their whole opinion is based upon the 1939 ex parte statements which were discorded in 1942 by the board itself. The fact is, as we have previously pointed out, these affidavits were considered as supplemented by oral testimony in the *deportation hearing* by several other witnesses, whose testimony appellant has not seen fit to discuss. Neither is the decision based upon suspicion, as counsel is pleased to call it, notwithstanding the fact that the board of Immigration Appeals and the District Court characterized the evidence as substantial.

The Kettunen case, 79 F. (2d) 315, cited by appellant was determined under an entirely different state of facts. In that case it was a question of "affiliation" while here the proof was "membership."

Appellant in this case has not been persecuted, as stated by counsel. The difficulties in which he finds himself are his own making. He has successfully avoided deportation to Canada for nearly nine years by various applications for relief on varying grounds, and by the employment of several different attorneys having varied views and expressing their opinions of what the law on the subject should be without denying what we assert the law on the subject actually is.

Appellant insists that the provisions of the Administrative Procedure Act are applicable to his case. What we have heretofore said on that subject, it would seem, is a complete answer to that proposition.

It is said, however, that on March 12, 1948 appellant made application for stay of deportation, which was denied. Counsel does not point out any provision of the Administrative Procedure Act which would entitle his client to the relief he sought at that time, nor did counsel at that time make any claim to the benefit of the procedures set out therein.

Appellant quotes from this Court's per curiam opinion in the case of *Yanish v. Barber*, 181 F. (2d)

492, as well as the regulations of the Department, but fails to mention that subsequent to that decision the Immigration Service did promulgate amended rules and regulations on August 3, 1950 (15 FR 6169-70), and again October 10, 1950 (15 FR 7366). The Yanish case, we understand, is now pending before this court on review from the California District Court because of the adoption of these new rules and regulations, and seeking clarification.

ARGUMENT IN SUPPORT OF JUDGMENT

The warrant of deportation issued on the 5th of January, 1948, commands that the appellant "who entered the United States at Blaine, Washington, on the 3rd of January, 1940, is subject to deportation under the following provisions of the laws of the United States, to-wit: The Immigration Act of 1917, in that he entered without inspection; the Act of February 5, 1917, as amended, in that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted by the proper authority; the Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and the Act of

October 16, 1918, as amended, in that he returned to or entered the United States, after having been excluded and deported, or arrested and deported in pursuance of the provisions of said Act which relate to anarchists and similar classes" be deported to Canada.

Section 3 of the Immigration Act of 1924, as amended (8 U.S.C. 203) provides:

"When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him, and (7) a representative of a foreign government in or to an international organization entitled to

enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, or an alien officer or employee or such an international organization, and the family, attendants, servants, and employees of such a representative, officer, or employee. (43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U.S.C. 203; Sec. 7 (c) Public Law 291, 79th Congress; Chapter 652, 1st Session; approved December 29, 1945)."

Section 13(a) of the Immigration Act of 1924 (8 U.S.C. 213 (a)), provides as follows:

"No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a non-quota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified as such; and (5) is otherwise admissible under the immigration laws." (Italics ours).

Section 14 of the Immigration Act of 1924 (8 U.S.C. 214) provides in part as follows:

"Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917: * * *".

Section 3 of the Act of October 16, 1918, provided as follows:

"That any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the provisions of this Act, thereafter return to or enter the United States or attempt to return to or to enter the United States shall be deemed guilt of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not more than five years; and shall, upon the termination of such imprisonment, be taken into custody, upon the warrant of the Attorney General, and deported in the manner provided in the immigration Act of February fifth, Nineteen Hundred and Seventeen. (40 Stat. 1012-1013; 8 U.S.C. 137)" (Italics ours).

Section 19(a) of the Act of February 5, 1917 (8 U.S.C. 155) provides in part as follows:

" * * * at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner of Immigration and Naturalization, or at any time not designated by immigration and naturalization officials, or who enters without inspection, shall upon the warrant of the Attorney General be taken into custody and deported:
* * *"

In rendering its decision of September 18, 1942, the Board of Immigration Appeals in directing the

reopening of the deportation proceedings commented in part as follows:

"The Immigration history of this man commences with his exclusion by a Board of Special Inquiry at Blaine, Washington, on January 3, 1939. The grounds for exclusion were that he was an immigrant not in possession of an immigration visa, that he was a person likely to become a public charge, and one who admits committing a crime involving moral turpitude, to-wit: adultery. He appealed and the excluding decision was affirmed solely on the ground that he was an immigrant not in possession of an immigration visa. He was granted permission to reapply for admission when in possession of an immigration visa, this aspect of the order upon appeal having been dictated in light of the Supreme Court's decision in *Hansen v. Haff*, 291 U. S. 559. We note parenthetically that since that time the subject has been divorced by his first wife and has entered into a valid marriage with the woman with whom he was living in Aberdeen, Washington on July 19, 1939 (Gov't. Exhibit (c) p. 3). There can be no doubt of this man's alienage in the light of his testimony that he was naturalized in Canada in 1926 (p. 2 of Exhibit C and see Exhibit V). The attorney argues in his brief that if Anderson never acquired legal citizenship in Canada because of misrepresentations as to his residence immediately prior to his Canadian naturalization, or if he has lost Canadian citizenship through failure to maintain his domicile there, then he is still or becomes a subject of the United States and is not deportable. This overlooks the fact, however, that the Canadian naturalization or at least the taking of the oath of naturalization, under the Act of 1907, resulted in a loss of American nationality and that regardless of his Canadian

status (Canadian consent to his acceptance as a deportee has been obtained) he is an alien for the purpose of our immigration laws.

Following this initial exclusion the alien was issued an immigration visa at Vancouver, B. C., on August 8, 1939. He immediately appeared before a Board of Special Inquiry at Vancouver and after a series of hearings which concluded on September 6, 1939, he was excluded under the Act of October 6, 1918, as amended by the Act of June 5, 1920, as a member of the Communist Party. He appealed from this excluding decision. Consideration of the appeal was delayed, partly at the request of the alien's counsel, and the matter was pending before this Board when the alien entered on January 3, 1940, without inspection. He immediately surrendered himself to the immigration authorities who took his statement and made application for a warrant of arrest on the ground that he entered without inspection and that he is a member of and affiliated with a body prescribed under the Act of 1918, as amended. The warrant issued however, on the charges that under the Act of 1917 he entered without inspection and the Act of 1917, as amended by the Act of March 4, 1929, in that he entered within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted. The case is now before us following warrant hearings. The attorney in his brief argues that because of prejudice exhibited by the immigration authorities at Vancouver this alien was unlawfully excluded and therefore was entitled to effect his entry following the issuance to him of an immigration visa in the manner he did. The attorney also urges that the appeal of the alien from the excluding decision of the Board of Special Inquiry should be upheld and he will then be ad-

missible nunc pro tunc as of the time he entered. These two contentions are untenable. The logical enforcement of the immigration laws with respect to exclusions requires literal enforcement of the exclusion notice which was delivered to this alien by the Chairman of the Board of Special Inquiry in Vancouver as follows: You are excluded from admission to the United States for a period of one year, unless admitted by our Central Office on appeal, unless permission to reapply for admission is granted you by the Secretary of Labor. Application for such permission should be forwarded to the Secretary through this office" (p. 19 of B.S.I. of Aug. 9, 1939). It has never been contended that an appeal from an excluding decision operates as a supersedeas either immediately or retroactively in the event the appeal is sustained. And obviously also it cannot be maintained that the officers of the Immigration and Naturalization Service who constituted the Board of Special Inquiry acted illegally and that therefore the alien is entitled to disregard their excluding decision, at least in the absence of definite and positive proof that the Board was illegally constituted by reason of disqualifying prejudice or otherwise. We note, also, that the alien is serving a prison sentence as a result of his commission of the crime of making an illegal entry. We therefore conclude that this alien is deportable upon the warrant charges. In view, however, of the disposition which we now make we do not at this time make the formal findings of fact and conclusions of law with respect to the charges contained in the warrant of arrest."

In ordering the appellant's deportation on the 8th of January, 1948, the Board of Immigration Appeals stated in part as follows:

"We considered the case on September 18, 1942. We agreed with the Presiding Inspector that respondent was subject to deportation on the warrant charges. However, because of the enactment of the Alien Registration Act since the institution of deportation proceedings, we reopened the hearing to permit respondent to apply for discretionary relief under Section 19(c) of the Act of February 5, 1917, as amended by the Alien Registration Act of 1940. We also directed that evidence be taken with respect to respondent's membership in the Communist Party of America and that, if the evidence warranted, an appropriate charge based upon the Act of October 16, 1918, as amended, be lodged against respondent. At the reopened hearing the two charges set forth above were lodged against respondent. At the conclusion of the reopened hearing the Presiding Inspector again recommended that respondent be deported.

We shall first briefly restate our reasons for upholding the charges contained in the warrant of arrest. There is no dispute that respondent deliberately evaded examination by the immigration authorities when he surreptitiously entered the United States on January 3, 1940. By returning to the United States in this manner, respondent entered without inspection within the meaning of the Act of February 5, 1917. Deportation proceedings were instituted within three years after that entry and, accordingly, respondent is subject to deportation on the first charge contained in the warrant of arrest.

We now turn to the second charge contained in the warrant. By illegally entering the United States on January 3, 1940, respondent abandoned the appeal taken by him in the exclusion proceedings. The excluding decision of the Board of Special Inquiry then became final. And, as

we shall show below when we discuss the validity of the second lodged charge, there was substantial evidence before the Board of Special Inquiry upon the basis of which it was warranted in excluding respondent from the United States. Accordingly, and since respondent admittedly had not received permission to reapply for admission to the United States following his exclusion by the Board of Special Inquiry, he is now subject to deportation on the second charge stated in the warrant.

The first charge lodged at the hearing is based on the fact that respondent had no immigration visa when he entered the United States on January 3, 1940. Respondent, as he admitted, then intended to remain permanently in this country and was therefore an immigrant. Under Section 13 of the Immigration Act of 1924 he was required to have such a document. In this connection we might say that the immigration visa which respondent presented to the Board of Special Inquiry in August, 1939, had already expired and in any event was not in his possession when he entered the United States in January, 1940. Furthermore, when the excluding decision of the Board of Special Inquiry became final, respondent was required to obtain a new consular document in order to thereafter enter the United States in compliance with the Immigration Act of 1924. We therefore conclude that respondent is subject to deportation on the first lodged charge.

The second lodged charge is based on Section 3 of the Act of October 16, 1918, as amended. This section provides in part for the deportation of any alien who returns to the United States after having been excluded and deported pursuant to the provisions of the Act of October 16, 1918. To support the second lodged charge the Gov-

ernment must establish that respondent prior to his last entry, was excluded and deported from the United States under the Act of October 16, 1918, as amended. As we said above the Board of Special Inquiry at Vancouver, B. C., excluded respondent on September 6, 1939, under Section 1 of the Act of October 16, 1918, as amended June 5, 1920, on the ground that he was a member of and affiliated with an organization that advocated the overthrow of the Government of the United States by force or violence and that distributed literature advocating such doctrines. The prescribed organization was found to be the Communist Party of America. Again, as we pointed out above, the excluding decision of the Board of Special Inquiry became final when respondent illegally entered the United States on January 3, 1940, thereby abandoning his appeal.

The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the Board of Special Inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America and that the Communist Party of America advocated and distributed literature advocating the overthrow of the Government by force or violence. See *Matter of Liquez*, 56019/547 (October 1, 1943; *Matter of Soto-Quintana*, 6388210 (January 13, 1947); cf. *Soskaloff v. Zurbrick*, 103 F. (2d) 570 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited to our review to the evidence taken by the Board of Special Inquiry at Vancouver at the hearings beginning on August 9, 1942 and terminating on September 6, 1942 (should be August 9, 1939 and terminated on September 6, 1939), and only that evidence. We shall not set forth the volu-

minous evidence developed by the Board of Special Inquiry on these issues. We simply point out that the statements of the witnesses (Deskins (Ex. H of Ex D), Clark (Ex. F of Ex. D) and Vekisch (Ex. G of Ex. D)), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the Board of Special Inquiry that respondent was a member of the Communist Party of America. Again, the Board of Special Inquiry was warranted in finding, on the basis of Exhibit L-P, that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force or violence. The second lodged charge is therefore sustained."

In denying the appellant's request for suspension of deportation, the Board of Immigration Appeals stated in part:

"Section 19(d) of the Act of February 5, 1917, as amended, provides in part that aliens subject to deportation under the Act of October 16, 1918, as amended, are not eligible for suspension of deportation. We have found respondent subject to deportation under this Act. For that reason alone we cannot suspend his deportation. An order of deportation will be entered."

The Commissioner of Immigration and Naturalization in denying the petitioner's request for a stay of deportation dated the 12th of March, 1948, commented in part as follows:

"While there can be no question but that the

applicant is in need of medical attention, the record clearly indicates that such medical attention can be obtained in Canada, to which country the alien is presently able to travel without injury to his life or his health. Accordingly, the instant application for stay of deportation should be denied."

The Board of Immigration Appeals when denying the appellant's request for a reopening of his case on the 9th of June, 1948, stated in part as follows:

"While the motion is not properly supported as Section 90.11(b), Title 8, C.F.R., requires, we would not grant the motion even if the proper supporting documents were submitted. As we said in our original opinion, respondent is not eligible for suspension of deportation because of his deportability on one of the grounds set forth in Section 19(d) of the Act of February 5, 1917, as amended."

In the case of *Monji Uyemura v. Carr*, 99 F. (2d) 729 (C.C.A. 9), October 18, 1938, Circuit Judge Garrecht who delivered the opinion of the Court stated in part:

" * * * It is immaterial that, upon the evidence presented, we might not agree with the conclusion reached, for the law is well settled that: ' * * * the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.'

U. S. ex rel Tisi v. Tod, 264 U. S. 131, 133, 44

S.Ct. 260, 68 L.Ed. 590. As we said in *Whitty v. Weedin*, 9 Cir., 68 F. (2d) 127, 130: 'The point to be determined by us is whether the appellant had a fair hearing, and, if it appears from the record that he had, we are not at liberty to disturb the decision of the lower court.

The truth of the facts is for the determination of the immigration tribunals, and where its procedure and decision are not arbitrary or unreasonable, and the alien has had a fair hearing, the result must be accepted.' "

Del Castillo v. Carr, 100 F. (2d) 338 (C.C.A. 9) was decided December 14, 1938. This Court stated in part:

"It may be argued that these facts alone if shown at a legal and fair hearing would support the trial judge in dismissing the writ. In the first place, neither the trial judge nor the judges of this court are weighers of evidence in a proceeding of this kind. If there is any substantial evidence to support it the order of the Assistant Secretary of Labor cannot be nullified through the writ of habeas corpus. *Ng Fung Ho v. White*, 259 U.S. 276, 278, 42 S.Ct. 492, 66 L.Ed. 938; *Ex parte Wong Nung, Wong Nung vs. Carr*, 9 Cir., 30 F. (2d) 766. * * *"

In *United States ex rel Schlimgen v. Jordan*, 164 F. (2d) 633 (C.C.A. 7), District Judge Lindley in delivering the opinion of the Court stated in part:

"Courts may not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed or

the evidence reflects manifest abuse of discretion. *Low Wah Suey v. Backus*, 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165; *Kessler v. Strecker*, 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082. Consequently, inasmuch as the party ordered deported can, in a habeas corpus proceeding, complain only of a failure of the administrative officer in one or more of these respects, the court acts upon the record made in the administrative hearing and may not try the issues de novo upon evidence not submitted in the first instance. *Kessler v. Strecker*, supra; *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938; *Lai To Hong v. Ebey*, 7 Cir., 25 F. (2d) 714. This results from the mandate of the statute, par. (a) Section 155, Title 8 U.S.C.A., reading: 'In every case where any person is ordered deported from the United States under the provisions of this Chapter, or of any law or treaty, the decision of the Attorney General shall be final'."

Mr. Justice Douglas when delivering the opinion of the Court in the case of *Bridges v. Wixon*, 65 S.Ct. 1443, 326 U.S. 135, 89 L.Ed. 2103 stated in part:

"In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (*Tisi v. Tod*, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590) or by showing that incompetent evidence was admitted and considered. *Vajtauer v. Commissioner* supra. 273 U.S. Page 106, 47 S.Ct. page 304, 71 L.Ed. 560. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus. See *Vajtauer v. Commissioner*, supra."

In the case of *Kessler v. Strecker*, 59 S.Ct. 694 307 U.S. 34, which was decided on April 17, 1939, Mr. Justice Roberts when delivering the opinion of the Court, stated in part:

"The Circuit Court of Appeals remanded the case to the District Court for a trial de novo. In this we think there was error. The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking the proceeding is void and must be set aside. A district court cannot upon habeas corpus, proceed de novo, for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. * * *"

In *Murdoch v. Clark*, (C.C.A. 1) 53 F. (2d) 155, decided November 3, 1931, the court held in part:

"It is true that deportation without a fair hearing or unsupported by any evidence is a denial of due process, which may be corrected on habeas corpus. But want of due process is not established by showing merely that the decision was erroneous, or that incompetent evidence was received and considered. The proceedings in deportation hearings are of a summary nature, are not criminal, are not required to be conducted according to the usual proceedings in courts of law; nor conferred to the strict rules of evidence enforced in the courts.

Upon a review on habeas corpus it is sufficient if there was some evidence from which the conclu-

sion of the administrative tribunal could be deduced, and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial. *Tisi v. Tod*, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590; *U. S. ex rel Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106, 47 S.Ct. 302, 71 L.Ed. 560; *Low Wah Suey v. Backus*, 225 U.S. 460, 468; 32 S.Ct. 734, 56 L.Ed. 1165."

In the case of *Nakazo Matsuda et ux v. Burnett*, (68 F. (2d) 276), decided in the Ninth Circuit on December 22, 1933, Circuit Judge Garrecht in delivering the opinion of the Court stated:

"The admission of any alien to the United States is subject to whatever condition the government sees fit to impose; the right to exclude or expel all aliens, or any class of aliens absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare. *Fong Yue Ting v. United States*, 149 U.S. 711 13 S.Ct. 1016, 1021, 37 L.Ed. 905."

Appellant's deportation to Canada has been ordered on the four grounds, to-wit: (1) that he entered without inspection; (2) that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted by proper authority; (3) that he was not in possession of a valid immigration visa and not exempted from the presentation

thereof; and (4) that he returned to or entered the United States, after having been excluded and deported, or arrested and deported in pursuance of the Act of October 16, 1918 (8 U.S.C. 137).

Entry without inspection is in itself sufficient ground to call for the issue of a warrant of deportation:

U. S. ex rel Natali v. Day, C.C.A. 2, 45 F. (2d) 112 (1930);

Wong Fat Shuen v. Nagle, C.C.A. 9, 7 F. (2d) 611 (1925);

Lidonnici et al v. Davis et al, 16 F. (2d) 532 (C. of A., D. of C. 1926, certiorari denied 274 U.S. 744 (1927));

Morini v. U. S., C.C.A. 9, 21 F. (2d) 1004, certiorari denied 48 S.Ct. 303.

After a criminal trial in the local District Court, Cause Number 45571, the appellant was convicted of illegally entering the United States on or about the 3rd of January, 1940, the entry upon which the deportation proceedings are based.

Appellant testified during the course of the hearing accorded him under the warrant of arrest in deportation proceedings on the 6th day of July, 1944, that at the time of his entry on the 3rd of January, 1940, it was his intention to reside in the United States.

The Court in *Del Castillo v. Carr* on December 14, 1938 (C.C.A. 9) 100 F. (2d) 338, stated in part:

"The Immigration Law provides for inspection of every person applying for entry for an indeterminate period, and such person under the law is termed an immigrant."

In *U. S. ex rel Polymeris v. Trudell*, 53 S.Ct. 143, 284 U.S. 270, 76 L.Ed. 291, Mr. Justice Holmes who delivered the opinion of the Court stated in part:

"The relators have no right to enter the United States unless it has been given to them by the United States. The burden of proof is upon them to show that they have the right. Immigration Act of 1924 No. 23, 43 Stat. 165 (U.S. Code Tit. 8, 221, 8 U.S.C.A. No. 221). By section 13 of the Act (8 U.S.C.A. 213) and the regulations under it, as remarked by the court below a returning alien cannot enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States by the only voice authorized to express its will, has said so. * * *"

United States ex rel De Vita, C.C.A. 2, November 7, 1938, 99 F. (2d) 825, rehearing denied 1939, 59 S.Ct. 464, 306 U.S. 631, 83 L.Ed. 1033. Circuit Judge Chase when delivering the opinion of the court stated in part:

"We will assume that the alien was returning in 1927 to an unrelinquished domicile in this country but, even so, he could not enter lawfully

unless he had either a reentry permit or an unexpired immigration visa. *United States v. Trudell*, 284 U.S. 279, 52 S.Ct. 143, 76 L.Ed. 291; *Id.* 2 Cir. 49 F. (2d) 730. Despite the fact of his previous lawful residence here, he was an alien immigrant within the definition of that term in Section 3 of the Immigration Act of 1924, 8 U.S.C.A. No. 203. *Karnuth v. United States*, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677. He has failed to show that he was within any of the exceptions dispensing with his need for an immigration visa. It is immaterial that he might, perhaps, have secured a reentry permit which would have done away with the need of an immigration visa for he had no re-entry permit. Section 13(b) of the 1924 Act, (8 U.S.C.A. No. 213(b)), upon which he relies merely permits returning immigrants who have complied with the prescribed regulations to enter without immigration visa but this relator had not so complied."

The record is clear that the appellant was excluded from admission to the United States by a legally constituted Board of Special Inquiry on the 6th day of September, 1939, and one of the grounds of his exclusion was on the ground that "he was a member of and affiliated with an organization, association, society or group that believes in, advises, advocates, and teaches the overthrow by force and violence of the Government of the United States, and as a member of and affiliated with an organization, association, society or group that writes, circulates, distributes, prints, publishes, and displays, and

causes to be written, circulated, distributed, printed, published, and displayed, and that has in its possession for the purpose of circulation, distribution, publication, issue and display written and printed matter advising, advocating, and teaching the overthrow by force and violence of the Government of the United States under the Act of October 16, 1918 (8 U.S.C. 137).

An alien entering within one year after exclusion at Canadian border without leave to apply again for entry is subject to deportation.

United States ex rel Griefenbaun v. Day, D.C.E. D. N. Y. 49 F. (2d) 805 (1931), Section 17 of the Act of February 5, 1917 (8 U.S.C. 153) reads in part as follows:

“ * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General; * * * ”

Although the appellant entered an appeal from the excluding decision of the Board of Special Inquiry, he abandoned the appeal by illegally entering the United States on the 3rd of January, 1940. The excluding decision therefore became final. Under the circumstances the decision of the Board of Special

Inquiry became final and the action is not subject to review. Moreover, it is believed that the decision of the Board of Special Inquiry was fair and supported by substantial evidence. It will be noted that there is nothing in the regulations which prohibit the use of ex parte statements in proceedings of this kind. The statements of the witnesses and of the petitioner himself were sufficient evidence to support the conclusion reached by the Board of Special Inquiry that petitioner was a member of the Communist Party of America and there is substantial evidence that the Communist Party was an organization that advocated and distributed literature advocating the overthrow of the Government by force or violence. Attention is also respectfully invited to the fact that at the commencement of the deportation hearing the counsel was given the opportunity to inspect the warrant and the evidence and was put in possession of all information necessary to enable him to prepare his defense. Attention is further respectfully called to the fact that at the request of the petitioner's counsel attempts were made to obtain for cross-examination, the three witnesses whose statements were considered by the Board of Special Inquiry in reaching its decision of the 6th of September, 1939. Mr. Deskins also was located and appeared for cross examination. Vekich and Clark were not available.

Judge Swan in *United States ex rel Ng Kee Wong v. Corsi* (C.C.A. 2) 65 F. (2d) 564 (1933) stated:

"That the Board of Special Inquiry was entitled to take into consideration its prior departmental records is not questioned and could not be. *Tang Tun v. Edsell*, 223 U.S. 673, 681, 32 S.Ct. 359, 56 L.Ed. 606; *Moy Said Chung v. Tillinghast*, 21 F. (2d) 810, 811 (C.C.A. 1); *Ex parte Wong Foo Gwong*, 50 F. (2d) 360 (C.C.A. 9). The dispute is as to the effect to be given such records. If the Board were to proceed on strict common-law principles of evidence the prior record could be used merely to discredit the present testimony of Ng You Lon, leaving the testimony of the applicant and his putative father unimpeached. This is an artificial doctrine. Practically, men will often believe that if a witness has earlier sworn to the opposite of what he now swears to he was speaking the truth when he first testified. These administrative boards are not bound by common law rules of evidence, and we see no reason why they should not be permitted to accept a witness' prior testimony as affirmative proof of the fact then asserted, provided it is thought worthy of credence. Such was the effect given it in the cases of *Moy Said Ching* and *Wong Foo Gwon*, *supra*. See also *Johnson v. Kock Shing*, 3 F. (2d) 889 (C.C.A. 1); *Wong Wey v. Johnson*, 21 F. (2d) 963, 964 (C.C.A. 1); *Chen Toy v. Nagle*, 27 F. (2d) 513, 514 (C.C.A. 9). The appellee seeks to distinguish those authorities because in them the prior contradictory testimony was given by a member of the family of the applicant not by mere neighbor. That distinction goes only to the weight of the prior testimony, not to the applicability of the rule per-

mitting it to be considered as affirmative evidence of the fact stated."

In the case of *O'Connell ex rel Kwong Han Foo v. Ward*, decided by the Circuit Court of Appeals, First Circuit on March 10, 1942, 126 F. (2d) 615, Circuit Judge Woodbury who delivered the opinion of the Court stated in part:

"It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair,' were 'such as to prevent a fair investigation' or show 'manifest abuse' of the discretion committed to the executive officers by the statute *Low Wah Suey v. Backus*, 225 U.S. 460, 472, 32 S.Ct. 734, 56 L.Ed. 1165, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of the due process of law,' *Tang Tun v. Edsell*, 223 U.S. 673, 681, 682, 32 S.Ct. 359, 363, 56 L.Ed. 606. The decision must be after a hearing in good faith, however summary, *Chin Yow v. United States*, 208 U.S. 8, 12, 28 S.Ct. 201, 52 L.Ed. 3, 369, and it must find adequate support in the evidence, *Zakonwaite v. Wolf*, 226 U.S. 272, 274, 33 S.Ct. 31, 57 L.Ed. 218." *Kwock Jan Fat v. White*, 253 U.S. 454, 457, 40 S.Ct. 566, 567, 64 L.Ed. 1010.

"Since the denial of a fair hearing before the Board cannot be established by merely showing that the decision of the Board was wrong, (*Chin Yow v. United States*, 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.Ed. 369), the District Court is without jurisdiction to consider the merits of cases

like the present until it has been established to that court's satisfaction that the applicant had not been given 'a hearing properly so called' by the Board. *Chin Yow v. United States*, *supra*; *Wong Wey v. Johnson*, 1 Cir. 21 F. (2d) 963; *Id.* 1 Cir. 23 F. (2d) 326, certiorari denied 277 U.S. 592, 48 S.Ct. 528, 72 L.Ed. 1004. * * *

In the case of *Masemichi Ikeda v. Burnett*, C.C.A. 9, 68 F. (2d) 276, decided on December 13, 1933, Circuit Judge Wilbur stated in part:

"Appellant also objected to the use of the immigration file of the proceedings for deportation of Masahara Sata and the reading of the part of the testimony of Masahara Sata therefrom into the record in this case. It is well settled that the immigration authorities may consider testimony contained in their official files and are not bound by strict rules of evidence in deportation proceedings. *Lum Tse Chew v. Nagle* (C.C.A.) 15 F. (2d) 636; *Yee Chun v. Nagle* (C.C.A.) 35 F. (2d) 839; *Ex parte Keizo Kamiyama* (C.C.A.) 44 F. (2d) 503; *Ex parte Susuki Fukumoto* (C.C.A.) 53 F. (2d) 618."

In *U. S. ex rel Doukas v. Wiley* (C.C.A.) 160 F. (2d) 92, decided February 7, 1947, the Court said:

"It is also well settled that the officer conducting the proceedings is not bound to observe the strict rules of evidence as enforced by judicial tribunals and that the improper admission of evidence is not a ground for reversal of the executive finding if the admission of that evidence has not resulted in a denial of justice. *Bilokumsky v. Tod*, 263 U.S. 149; 44 S.Ct. 54, 68 L.Ed. 221 and *Tang Tung v. Edsell*, 223 U.S. 673, 32 S.Ct. 359, 56 L.Ed. 606."

In re *Giacobbi*, District Court, N.D. New York, July 27, 1939, 32 F. Supp. 508 (affirmed *United States ex rel Salvatore Giacobbi, Appellant v. J. Arthur Fluckey, Director of Immigration, Appellee* (C.C.A. 7), March 25, 1940, 111 F. (2d) 297, it is stated in part:

"It has been held that deportation proceedings were not unfair even though the alien was denied opportunity for cross-examination of certain witnesses. *Coranica v. Nagle*, 9 Cir. 23 F. (2d) 545, certiorari denied 277 U.S. 589, 48 S.Ct. 437, 72 L.Ed. 1002."

Having further reference to the admissibility it is believed that the dissenting opinion of the Supreme Court in the case of *Bridges v. Wixon*, 65 S.Ct. 1443, 326 U.S. 176, is applicable to the present case. Chief Justice Stone in delivering the dissenting opinion stated in part:

"And no principle of law has been better settled than that the technical rule for the exclusion of evidence, applicable in trials in courts, particularly the hearsay rule, need not be followed in deportation proceedings. *Bilokumsky v. Tod*, supra, 263 U.S. 149, 153, 44 S.Ct. 54, 55, 68 L.Ed. 221 and cases cited: *Tisi v. Tod*, supra, 264 U.S. 133, 44 S.Ct. 260, 68 L.Ed. 590; *Vajtauer v. Commissioner of Immigration*, supra, 273 U.S. 106, 47 S.Ct. 304, 71 L.Ed. 560, more than in other administrative proceedings.

With increasing frequency this Court is called upon to apply the rule, which it has followed for

many years, in deportation cases as well as in other reviews of administrative proceedings, that when there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and weight. *Merchant's Warehouse Co. v. United States*, 283 U.S. 501, 508, 51 S.Ct. 505, 508, 75 L.Ed. 1227; *Federal Trade Commission v. Education Society*, 302 U.S. 112, 117, 58 S.Ct. 113, 115, 82 L.Ed. 15, 141; *Consolidated Edison Co. v. Labor Board*, supra, 305 U.S. 229, 59 S.Ct. 216, 83 L.Ed. 126; *National Labor Relations Board v. Nevada Copper Co.*, 316 U.S. 195, 62 S.Ct. 960, 86 L.Ed. 1305; *Marshal v. Platz*, 317 U.S. 383, 388, 63 S.Ct. 284, 286, 87 L.Ed. 348; *National Labor Relations Board v. Southern Bell Co.*, 319 U.S. 50, 60, 63 S.Ct. 905, 910, 87 L.Ed. 1250; *Mido Corp. v. Labor Board*, 321 U.S. 678, 681, 682, 64 S.Ct. 830, 831, 832, 88 L.Ed. 1007. We cannot rightly reject the administrative finding here and accept, as we do almost each week particularly in our denials of certiorari, the findings of administrative agencies, which rest on the tenuous support of evidence far less persuasive than the present record presents."

CONCLUSION

There has been no misapplication or misconstruction of law or showing that the appellant has been unduly detained and restrained of his liberty, nor was the action of the Attorney General or his authorized representative in issuing the warrant of deportation arbitrary, capricious or in contravention of any rule of law; hence, it is final.

The petition for the writ of habeas corpus was properly denied by the District Court and its judgment should be affirmed.

Respectfully submitted,

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No. 12719

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED TRUCK LINES, INC., a Corporation,
Appellant.

VS.

INTERSTATE COMMERCE COMMISSION,
Appellee

Appellant's Opening Brief

*Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division*

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED TRUCK LINES, INC., a Corporation,
Appellant.

vs.

INTERSTATE COMMERCE COMMISSION,
Appellee

Appellant's Opening Brief

*Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division*

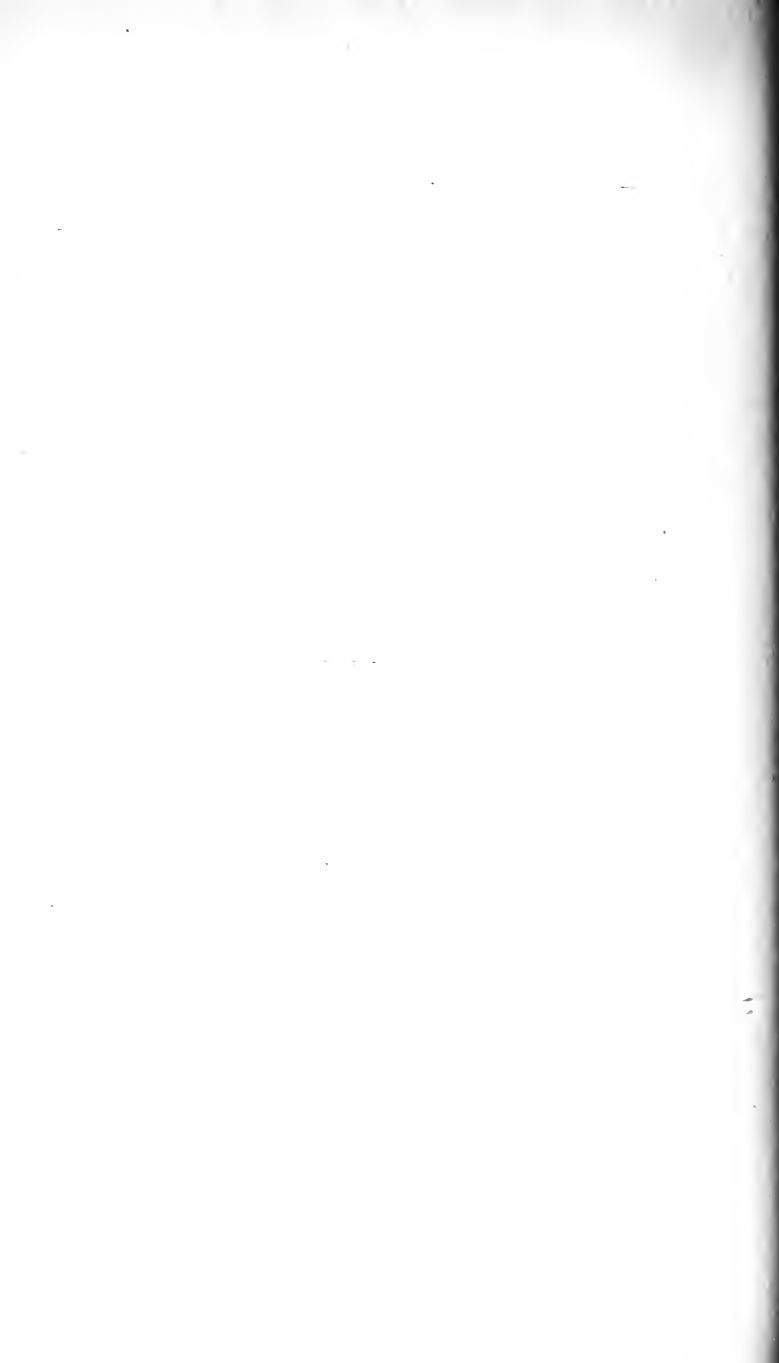
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JURISDICTION

This action was brought by the Appellee, the Interstate Commerce commission, hereinafter called the Commission, against Appellant, United Truck Lines, Inc., the United Truck Lines, Inc., a corporation engaged in the transportation of property for compensation as a common carrier in interstate commerce by motor vehicle on public highways between points and places in the State and the Eastern District of Washington, and within the jurisdiction of this District Court, and is subject to the provisions of Part II of the Interstate Commerce Act (49 U.S.C. Chapter 8). The corporation is and was a citizen and resident of the State of Washington. Appellant hereinafter called United. The action instituted by the Commission against the United was because of the operations by United in traversing U. S. Highway No. 30, from Boise, Idaho to Pasco, Washington.

The controversy was therefore, a controversy which at the time of the commencement of this action, was and still is, between the Interstate Commerce Commission as Appellee, and a citizen of the State of Washington as Appellant. On a certificate issued by the Commission to the United, there involves the interpretation of the authority to operate under said certificate.

Jurisdiction of the District Court existed under provisions of Section 204 (a) and Section 222 (b) of Part II, of the Interstate Commerce Act (Title 49, U.S. Code) Sections 304 (a) and 322 (b) and under the general laws and rules relative to suits in equity arising under the constitution and laws

of United States. The appeal to this court is from the Order and Judgment for permanent injunction decreeing that the Appellant herein be permanently enjoined and restrained, from on and after 12:00 noon on the 20th day of September, 1950 from, in any manner, by and devise, directly or indirectly, from transporting property for compensation in interstate commerce by motor vehicle on public highway designated as U. S. No. 30, between Boise, Idaho, and Pasco, Washington, and the further order that Appellee have its costs herein incurred, dated on the 20th day of September, 1950. Notice of Appeal was filed in the office of the Clerk of the District Court on the 20th day of September, 1950, and jurisdiction is believed to exist under Section 225 (a) and (d) Title 28 U.S.C.A. and (d) Title 28 Section 225 (a) and (d) Title 28 U.S.C.A., Judicial Code, Section 128 amended.

STATEMENT OF THE CASE

The material facts of this case are not in dispute and the issue involved is comparatively clear.

On the 27th day of March, 1944, the Interstate Commerce Commission issued to the Appellant herein, a certificate of Public Convenience and Necessity being MC 7746 (Tr. 14, 15, 16, 17, 18, 19, 20, 21), wherein the Appellant, among other points and places, was authorized to serve Pasco, Washington in Benton County as a intermediate point on its regular route operation between Spokane and Portland (TR. 17).

On the 25th day of February, 1948, the Interstate Commerce Commission issued to the Appellant herein, a certificate of public convenience and necessity, being No. MC 7746 Sub 18, wherein Appellant was authorized to serve between Spokane and Boise over specified routes serving certain intermediate points.

On the 18th day of April, 1949, the Interstate Commerce Commission issued to the Appellant herein, a certificate of public convenience and necessity, being No. MC 7746 Sub 22, which reads as follows:

General Commodities

except those of unusual value, dangerous explosives, household goods as defined in Practice of Motor Carriers of Household Goods, 17 M.C.C. 467, Commodities in bulk, and commodities requiring special equipment.

Service is authorized to and from points in Grant, Lincoln, Franklin, Adams and Benton Counties, Wash., as intermediate and off-route points in connection with

said carrier's otherwise authorized regular-route *operations*.

The authority herein granted to the extent it duplicates any heretofore granted to said carrier shall not be construed as conferring more than one operating right.

And it is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably and continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

While the commodities are restricted, there is no restriction on the services to be performed under the certificate and no restrictions whatsoever, which prohibit the holder from transversing any route from his regular route operations, to and from the points and places in the five counties, nor is there any limitation as to the distance the holder of said certificate may operate from his regular route operations, to points and places in the five counties as off-route points.

Appellant in compliance with the conditions of said certificate commenced operating from Boise, Idaho to Fruitland, Washington, and deviating from Fruitland over U. S. Highway No. 30, to Pasco, Washington, as off-route point in Benton County served in conjunction with its operations, namely, Spokane to Boise, No. MC 7746 Sub 18 and continued to render such service under and by virtue of MC 7746 Sub. 22.

The Commission filed a Summons and Complaint on the 28th day of February, 1950, in the District Court, Eastern

District of Washington, Northern Division, for an order permanently enjoining and restraining the Appellant from using U. S. Highway No. 30, to which complaint the Appellant made answer and entered an affirmative defense, which was replied to by the Commission.

That on June 12, 1950, the Commission filed a Motion for Preliminary Injunction with the United States District Court for the Eastern District of Washington, Northern Division, which Motion came on for hearing the 7th day of August and was continued until pre-trial conference, which was held on September 6, 1950, that thereafter on the 8th day of August, the Commission filed for an Order for pre-trial conference, as provided for under rule 16, which conference was held in conjunction with the Complaint of the Appellee, and the answer and affirmative defense of the Appellant; that the court entered an order on the 20th day of September, 1950 permanently enjoining and restraining the Appellant from operating by motor vehicle in interstate commerce for compensation over U. S. Highway No. 30, between Boise, Idaho and Pasco, Washington.

SPECIFICATIONS OF ERROR

1. The District Court erred in granting to Plaintiff, a Order and Judgment for permanent injunction as prayed for in Plaintiff's Complaint, which order was signed and filed September 20, 1950.

2. The District Court erred in denying Defendants prayer in its answer asking that the Plaintiff's Complaint be dismissed and that its Order of Injunction for restraint be denied.

ARGUMENT

Specifications of error 1 deals with what Appellant conceives to be the wrongful interpretation of certificate MC 7746 Sub 22, held by the Appellant.

I

CERTIFICATE NOT RESTRICTED

The District Court construed the certificate as not authorizing the Appellant to transverse U. S. Highway No. 30, from Boise, Idaho to Pasco, Washington, such restriction is not substantiated by Section 208 (a) of Part II of the Interstate Commerce Act, U. S. Code, Title 49, Section 308, and reads as follows:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Secion 204 (a) (1) and (6).

The District Court in effect construed certificate MC 7746 Sub 22 to one with limitations rather than one unrestricted, as can readily be concluded from the Section above quoted, which governs the terms and conditions of a certificate. It

seems to the Appellant, therefore, that if the Court is to hold the operations by the Appellant over U. S. Highway 30 illegal, there must be read into the certificate, a restriction that service, to and from, Appellant's otherwise authorized regular route operations embodies only the operations from Spokane to Portland. The Appellant believes this is reading into the certificate something which does not appear on its face, and, in fact, cannot result from a reasonable interpretation of the language used.

There is, perhaps, another way of considering the certificate that may make Appellant's position a little clearer. Certificate MC 7746 Sub 18, authorizing Appellant to serve from Spokane to Boise, over specified highways, with certain restrictions, was issued on the 25th day of February, 1948, and more than a year subsequent thereto, MC 7746 Sub 22 was issued, to-wit; on the 18th day of April, 1949, and authorizes service to and from the points and places in the five counties named in the certificate, as Off Route and intermediate points. If a shipment originates in Boise, Idaho destined for Pasco, Washington, which point would be, and is, an Off Route point from the Spokane-Boise operation, Appellant could, without question, move the shipment over U. S. Highway 30 under MC7746 Sub 22 certificate. But if he cannot transport the shipment over that route as provided in the certificate, he is being denied rights to operate under the certificate that has been granted with no restrictions of any kind whatsoever as to the route he must traverse. The Commission certainly has no right in 1950, in the absence of inadvertence or mistake, to restrict the operation of a certificate issued in 1949.

SMITH BROS. REVOCATION OF ORDER 33 M. C. C. 465.

II

NO COMPETENT PROOF OF ILLEGAL OPERATION

Specification of Error 1, further deals with what appellant conceives to be error of the Trial Court in holding that the Commission had produced competent proof of illegal operation over Highway U. S. 30 from Boise, Idaho to Pasco, Washington. The commission did not offer or produce any rule of the Commission setting out how far a carrier may travel from his regular route operation to serve a point designated as an off route point from the regular route. The reason for the commission to offer or produce such evidence is quite clear. **THERE IS NO SUCH RULE ADOPTED BY THE COMMISSION. EVERY APPLICATION IS TREATED SEPARATELY AND INDIVIDUALLY AS TO THE POINTS AND PLACES TO BE SERVED.**

The commission did cite three decisions to the Court in support of its complaint.

(Tr. 48) a, Los Angeles Motor Express, Inc., decided July 2, 1940 (M. C. C. 141)

b, System Arizona Express Service, Inc., decided January 14, 1938. (4 M. C. C. 129)

Dixie Freight Lines, Inc., decided May 28, 1941. (29 M. C. C. 406) (2 Federal Carriers Cases 7799)

Obviously the Trial Court relied upon these cases to support the Order and Judgment entered against the appellant. However, the cases cited, do not, define and interpret the term "Off route" points and limitations of service thereto from authorized regular route operations of carriers. The decisions fail to establish the specific distances. Each case

considered separately as to what the distance on "Off route points". The commission did give reason for denying the application to serve certain points as "Off Route" as being too far distant from the regular route of the applicant. HOWEVER, it cannot be accepted that the cases cited tend in any way to interpret the rights of appellant to operate under Mc 7746 Sub 22. The above cited cases were denied in part, particularly, as to the certain off route points.

IN THE INSTANT CASE the certificate was GRANTED.

RULES OF COMMISSION GOVERNING ROUTES TO TERRITORIES

Item 10. Routes to Territories.

Item 6 & 10 Routes to Territories

Item 10.

Serving territorially described off-route point.

Where off route points are described as "those within 35 miles of Blank City" the carrier may leave the regular route before the route enters that area if that is the most direct available means of reaching points therein to be served.

It is not necessary that the diversion from regular route be made at an authorized intermediate point.

Having reached the area the carrier may proceed from one point to another therein without returning to its regular route each time.

Return to the regular route need not be over the same highway as the entry, but may be by any direct means from the last point served in the area.

L-21277 March 30, 1949

It can readily be concluded from the above Rule of the commission above set out that the decisions in the cases cited by the commission are inconsistent with the Rule adopted March 30, 1949, also by Rule, as follows:

Item "6". Service only from appurtenant Route.

An off-route point may be served only from the route to which it is appurtenant—that is the route in the certificate in connection with which point is granted. A carrier after disgressing from a route to serve an off-route point must return to that route.

It may not go to another route unless authorized to serve the off-route point from both sides.

(Dixie 29 M. C. C. 406)

The wording of the certificate Mc7746-Sub 22 certainly grants to the appellant the authority to serve the territory described as the five counties from both sides.

WORDING OF CERTIFICATE MUST GOVERN

Specifications of Error 2 deal with what the appellant conceives to be error of the Trial Court in not granting appellant's prayer for dismissal of the Commission's Complaint. The wording of the certificate "Service is authorized to and from". The terms "to and from" must be accepted in the common usage which reason and sense entitles them under circumstances of case. They can only have one meaning insofar as this case is concerned, namely to haul to any of the points in the five counties and from any of the points in the five counties "as intermediate and off-route points in connection with said carrier's otherwise regular-route

operations. The word "operations" can only be accepted as including all of the operations of the appellant. It is not restricted to one, two or three, but to all operations.

The certificate mentions no specified route or routes that appellant must traverse to serve the points. In the opinion of the appellant it can only be construed to authorize service to the points and places in the five counties as off-routes over whatever route is the most practical and shortest in the operations as a carrier in rendering services from the territory that is authorized to serve by virtue of his certificates under Mc7746 and the subs thereto.

OPERATION NOT OVER SPECIFIED ROUTES

IN CRESCENT EXPRESS LINES -V- U.S.D.C.N.Y., 49
F. Supp. 92, 94.

"Operations not over specified routes" were operations within a defined territory not upon regular routes or between fixed termini.

The appellant contends that the wording of the certificate Sub 22 sets out all points and places in his regular route operations as the territory from which he is authorized to serve from, to points and places in the five counties named in the certificate. However viewed this certificate is unrestricted as to the routes over which the appellant must traverse to serve said points, and the miles it can travel in rendering such service, so long as it is in connection with its regular route operations.

CONCLUSION

The District Court should of granted appellant's prayer for a dismissal of the complaint either on the ground that the Commission failed to establish that there was an illegal operation or that the wording of the certificate held by appellant granted it authority to operate over U. S. Highway 30 from Boise, Idaho to Pasco, Washington, as an off-route point in Benton County, Washington.

Respectfully submitted,

REILLY AND CAEL,

EDWARD J. REILLY,

Attorneys for Appellant

No. 12719

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

UNITED TRUCK LINES, INC.,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION

Appellee.

No.
12719

*Appeal from the United States District Court
Eastern District of Washington
Northern Division*

BRIEF FOR APPELLEE

FILED

MAR - 2 1951

HARVEY ERICKSON, PAUL P. O'BRIEN,
United States Attorney CLERK

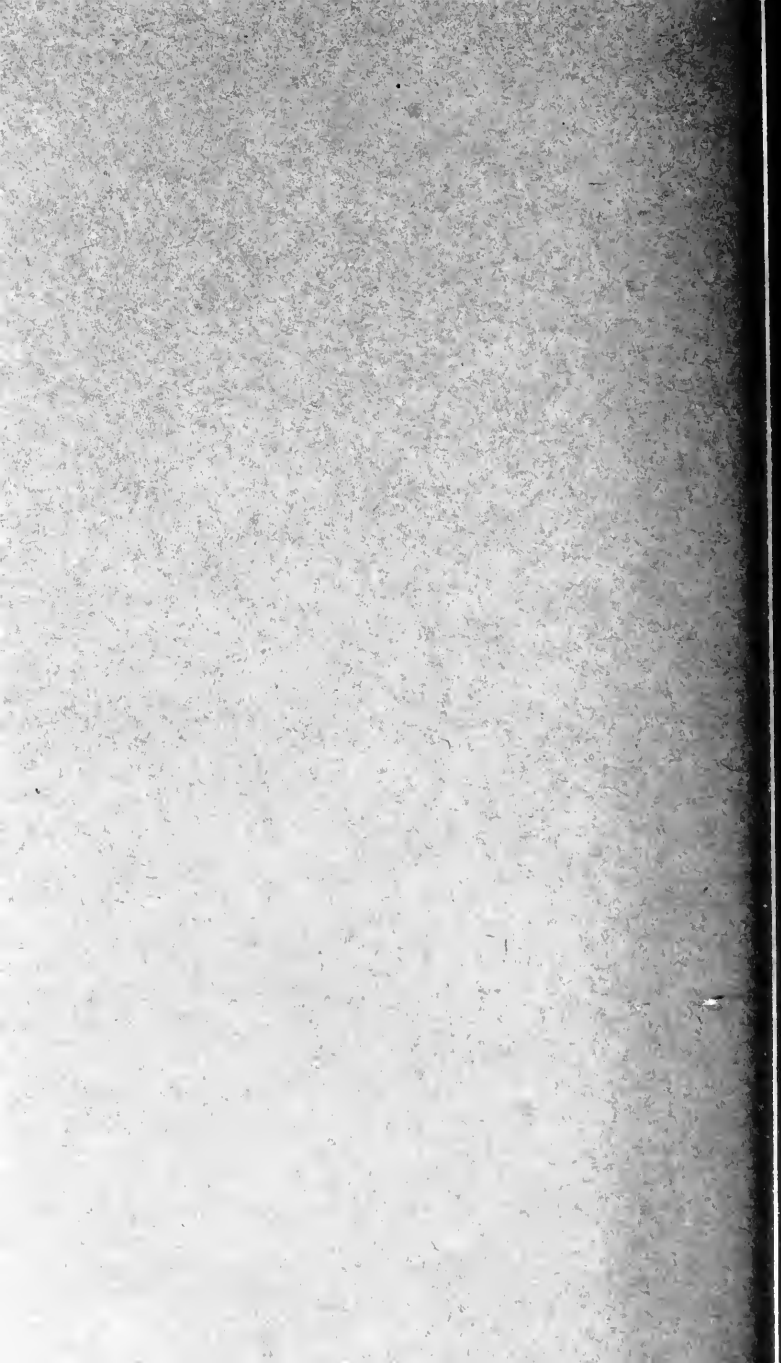
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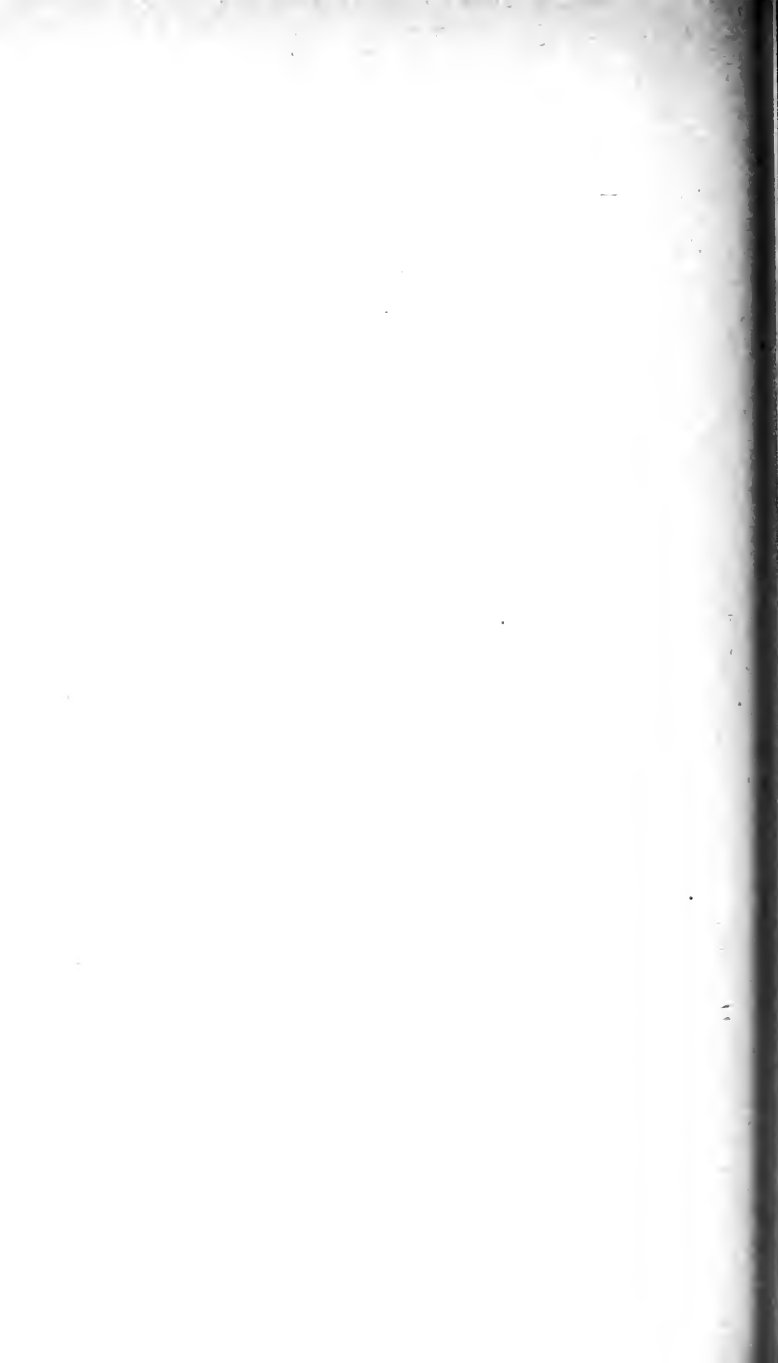
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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

No. 12719

UNITED TRUCK LINES, INC.,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION

Appellee.

No.
12719

BRIEF FOR APPELLEE

Appellee is not satisfied that a clear and accurate statement of the case and issues is contained in appellant's brief. Therefore, the following is submitted:

STATEMENT OF THE CASE

This appeal is from the order and judgment of the District Court of the United States for the Eastern District of Washington,, Northern Division (Honorable Sam M. Driver, District Judge), entered September 20, 1950, permanently enjoining defendant-appellant, United Truck Lines, Inc., a common carrier by

motor vehicle, from transporting property for compensation in interstate commerce by motor vehicle on public highways designated as U. S. No. 30, between Boise, Idaho and Pasco, Washington, except as authorized by a certificate of public convenience and necessity or other appropriate authority issued by the Interstate Commerce Commission.

The action was initiated by complaint filed by the appellee Commission on February 28, 1950, under authority of Sections 204(a) and 222(b) of the Interstate Commerce Act (Title 49, U. S. Code, Sections 304(a) and 322(b)) and under the general laws and rules relative to suits in equity arising under the Constitution and laws of the United States. An answer was made by defendant on March 16, 1950. Reply to the answer was filed by the plaintiff-appellee on May 15, 1950. A motion for summary judgment was filed by plaintiff-appellee on August 18, 1950, and a permanent injunction was granted, effective 12 o'clock Noon, September 20, 1950. On the same date defendant filed a notice of appeal (28 U.S.C., Sec. 1291) from the judgment, and a motion to stay the execution thereof, which motion was granted. No written opinion was rendered by the District Court.

STATEMENT OF THE FACTS

Appellant, a Washington corporation, organized on September 28, 1933, has extensive operating authority as a common carrier in the Pacific Northwest Territory described in appellant's Exhibit "A" (R. 14-34). The only portions thereof relevant to this case concern the authority issued to it by the Interstate Commerce Commission in the following instances:

A certificate was issued March 27, 1944, in Docket No. MC-7746, authorizing transportation of general

commodities between Portland, Oregon and Spokane, Washintgon, over a regular route, as follows:

From Portland over U. S. Highway 99 to Vancouver, Washington, thence over U. S. Highway 830 to Maryhill, Wash., thence over U. S. Highway 97 to Toppenish, Wash., thence over Unnumbered Highway to Zillah, Wash., thence over *U. S. Highway 410 to Pasco, Wash.*, and thence over U. S. Highway 395 to Spokane, and return over the same route. (Emphasis added).

Service is authorized to and from the intermediate points of Kennewick, Pasco, Connell, Lind, Ritzville, Sprague, and Cheney, Washington.

In Docket No. MC-7746, Sub. No. 18, a certificate was issued February 25, 1948, authorizing transportation of general commodities between Spokane, Washington and Boise, Idaho, over a regular route, as follows:

From Spokane, Washington, over U. S. Highway No. 195, through Pullman, Wash., to junction of U. S. Highway No. 95 (also from Pullman, over Washington State Highway No. 8 to Moscow, Idaho, and thence over U. S. Highway No. 95 to junction of U. S. Highway No. 195), thence over over U. S. Highway No. 95 to junction of U. S. Highway No. 30 near Fruitland, Idaho, thence over U. S. Highway No. 30 to Boise, Idaho, and return over the same route.

In Docket No. MC-7746, Sub 22, a certificate was issued April 18, 1949, permitting appellant to transport general commodities, with the usual exceptions, as follows:

Service is authorized to and from points in Grant, Lincoln, Franklin, Adams, and *Benton* Counties, as intermediate and off-route points in connection with said carrier's authorized regular-route operation. (Emphasis supplied).

Paragraph III of the complaint alleges that appellant from July 1, 1949, up to and including the date of the filing of the complaint, engaged in the transportation of property for compensation in interstate commerce, by motor vehicle, over portions of the public highway designated as U. S. No. 30 between Boise, Idaho and Pasco, Washington. Appendix "A" attached thereto listed eight representative instances of operations conducted by appellant over that route, all of which were performed outside the scope of the certificate issued to appellant in Docket No. MC-7746 and Sub Nos. 18 and 22, in violation of Section 206(a) of the Interstate Commerce Act (49 U.S.C., 306(a)).

THE QUESTION AT ISSUE

Appellant admits that it has been operating between Pasco, Washington and Boise, Idaho, over U. S. Highway No. 30, and in support of its position that such operations are lawful contends that the city of Pasco, in Benton County, Washington, is an off-route point to its otherwise authorized operations—namely its regular-route operations between Spokane, Washington and Boise, Idaho. Appellee, on the other hand, denies that any of the certificates described in appellant's Exhibit "A" (Tr. 14-34) authorized appellant to perform transportation between Boise, Idaho and Pasco, Washington, over U. S. Highway No. 30, and denies that Pasco is an off-route point in connection with appellant's authorized regular-route operations between Boise, Idaho and Spokane, Washington.

The sole question before the court, therefore, is whether appellant is authorized to operate over U. S. Highway No. 30, between Boise and Pasco (in lieu of operating over its authorized regular routes between Boise and Portland via Spokane) on the theory

that Pasco is an off-route point in connection with appellant's authorized regular-route operations between Boise and Spokane.

ARGUMENT

By reference to appellant's certificate No. MC-7746, conferring rights to operate over the route between Portland, Oregon and Spokane, Washington, it will be noted that Pasco, Washington, is described as an intermediate point on U. S. Highway 410. The certificate states (Tr. 17):

Service is authorized to and from the intermediate points of Kennewick, *Pasco*, Connell, Lind, Ritzville, Sprague, and Cheney, Washington.
(Emphasis supplied).

Appellant's certificate No. MC-7746, Sub. 22, grants authority by using the following language (Tr. 27):

Service is authorized to and from points in Grant, Lincoln, Franklin, Adams and *Benton* Counties, Wash., as intermediate and *off-route* points in connection with said carrier's otherwise authorized regular-route operations. (Emphasis added).

As we understand appellant's position, it contends that Pasco, which is in Benton County, Washington, is an off-route point in connection with its authorized regular-route between Portland and Spokane, and that it is authorized to serve Pasco by virtue of the last-quoted certificate above. The Commission (appellee) denies that contention, and the issue thus joined presents the principal question now before the court.

The weakness which is immediately apparent in appellant's position is that it is based upon the false hypothesis that Pasco is an "off-route point in connection with said carrier's otherwise authorized regu-

lar-route operations". Pasco is not an off-route point in any sense. On the contrary, appellant's certificate No. MC-7746 specifically names Pasco as one of the intermediate points (that is, an on-route point) which appellant is authorized to serve on its authorized route between Portland and Spokane (Tr. 17).

Appellant contends, however, that it is also authorized to serve Pasco as an off-route point in connection with its authorized regular-route operations between Boise and Spokane. In performing through transportation between Boise and Portland it has been operating over U. S. Highway 30 between Boise and Pasco, under its claim that Boise is an "off-route point" in connection with its Boise-Spokane operations, and its doing so constitutes the basis for this action.

On pages 14 and 15 of its brief, appellant has set forth what it terms "Rules of Commission Governing Routes to Territories". To the extent that it creates the impression that formal rules have been adopted, appellant's statement is in error. No such rules, or any other rules or regulations on the subject, have been prescribed by the Commission. The so-called rules set forth in appellant's brief appear to have been copied from informal opinions expressed in communications from one employee of the Commission to another, as indicated by the file reference "L-21277 March 30, 1949". It goes without saying that such expressions are in no sense "rules of the Commission," having the force and effect of law.

In fact, appellant admits at another place in its brief (page 13) that no rules and regulations defining "off-route points" have been prescribed by the Commission. With that statement we fully agree. Moreover, we insist that there is no need for such rules. The Commission, in its formal decisions on motor

carriers' applications for operating rights, has many times defined the term "off-route point". For that reason the term has a technical and well understood meaning in the motor carrier industry. Appellant's certificates should be interpreted in accordance with that meaning. *Black v. Interstate Commerce Commission*, 167 F. (2d) 825, and authorities there cited.

Before mentioning any of the Commission's decisions in which the term "off-route point" was defined, we desire to mention a well-known principle of statutory construction. It is that the interpretations placed upon provisions of the Interstate Commerce Act by the Commission (which the courts have stated possesses special competence in this field) are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 402; *Brewster v. Gage, Collector of Internal Revenue*, 280 U. S. 327, 336. In one case it was stated that "the Commission's construction (of a certificate), unless clearly erroneous or arbitrary, must be accepted by the courts". *Adirondack Transit Lines, Inc. v. United States*, 59 F. Supp. 503; affirmed by the Supreme Court, 324 U. S. 824.

We shall next refer to a few of the Commission's decisions dealing with the authority of motor carriers to serve off-route points.

In *Dixie Freight Lines, Inc. Extension Application*, 29 M.C.C. 406, the Commission stated:

An off-route point is one usually served by line-haul equipment making a short side trip and returning as soon as possible to the regular route or schedule. (Emphasis added).

In deciding the application of *System Arizona Express Service, Inc.*, 4 M.C.C. 129, 131, the Commission stated:

Most of the so-called off-route points in Arizona are so far off-route as to lose their status as such. An off-route point usually is one served by line-haul equipment making a short side trip and returning as soon as possible to its regular route and schedule. When asked as to the extent of departure from the regular routes in the performance of off-route service past and proposed, applicant's manager suggested that such service would relate to hauls of 150 miles from regular routes. *Obviously, such service is not off-route service as that term ordinarily is used * * ** The authority granted herein will include authority to serve off-route points in Arizona west of Phoenix which are between U. S. Highways 60 and 80; or which are not more than 25 miles north of U. S. Highway 60, or not more than 25 miles south of U. S. Highway 80. (Emphasis added).

Again, in *Los Angeles-Seattle M. Express, Inc.*, 24 M.C.C. 141, 145, the Commission said:

San Diego, California, is situated too far distant from Los Angeles to be termed an off-route point.

It necessarily follows from these decisions that an off-route point must be situated within a reasonably short distance from the route to which it is appurtenant. Can it be said, then, that Pasco is such an off-route point in connection with appellant's authorized route between Boise and Spokane? Let us consider the facts in this connection.

The route over which appellant is authorized to operate between Boise and Spokane is described in the certificate by reference to certain numbered highways (Tr. 22), and service is authorized to and from certain specified intermediate points on said route and one named off-route point, but not to or from Pasco. In serving Pasco (under the claim that it is an off-route point in connection with appellant's Boise-Spokane

regular-route operations), appellant admittedly has been operating over U. S. Highway 30 between Boise and Pasco. From a Rand McNally road map it appears that Pasco is more than 200 miles distant by highway from the point where appellant's vehicles leave its Boise-Spokane authorized route in order to serve Pasco as an off-route point. The round-trip distance (from the point of departure from the Boise-Spokane authorized route to Pasco and return) is more than 400 miles. May such a departure be regarded as "a short side trip"? Merely to ask the question is to disclose the unreasonableness of appellant's contention.

In this connection it is worth noting that the Commission has many times held that "off-route point authority is not severable from the route or routes to which it is commonly appurtenant". *Knorr M. Service, Inc.—Purchase—J. Bedford M. Service, Inc.*, 36 M.C.C. 713; *Norwalk Truck Line Co.—Purchase—Midwest M. Freight Co.*, 37 M.C.C. 376.

Appellant asserts that the effect of the decision of the district court is to read into its certificate No. MC-7746, Sub 22, a restriction which the certificate does not contain. While the certificate does not specifically restrict the distance to which appellant may travel in serving off-route points, the certificate must be read in the light of the well understood meaning of the term "off-route points" as declared by the Commission and as indicated above. Moreover, "it is not the function of a certificate to enumerate the operations which may not be performed". *Gay's Express v. Haigis & Nichols*, 43 M.C.C. 277, 280. Under the provisions of Section 208(a) of the Interstate Commerce Act (49 U. S. Code 308(a)), a certificate is required only to specify the services which the carrier

may perform thereunder, not those which he is forbidden or restricted from performing.

Appellant also contends (page 15 of its brief) that the wording of its certificate is such that service is authorized to and from any of the points in the five counties as intermediate and off-route points in connection with its authorized regular-route operations, and implies that the word "operations" includes all its operations over whatever route is the most practical and shortest. This argument, likewise, has no foundation because, as demonstrated above, Pasco is an "on-route" point and therefore cannot be classified as off-route.

The unauthorized operations in which appellant has been and is engaged are substantial. There is nothing trivial about them. They amount to much more than merely transporting an occasional shipment from Boise to Pasco or from Pasco to Boise over U. S. Highway 30. Under appellant's claim that it has the right to serve Pasco as an off-route point in connection with its Boise-Spokane regular-route authority, it has been conducting its through operations between Boise and Portland over U. S. Highway 30, rather than over the much longer route it is authorized to traverse from Boise to Spokane to Portland, and vice versa. Its said operations over the shorter route not only constitute unfair and unlawful competition with motor carriers holding authority to operate over that route, but present the question whether a carrier such as appellant shall be permitted to engage in interstate operations over a cut-off or alternate route without first obtaining the authority which the statute requires it to have.

This is not a situation wherein the Commission is arbitrarily insisting that appellant operate over the longer (and perhaps less economical) route. Upon

appellant's filing a proper application and making proof of public convenience and necessity for such authority, the Commission would grant appellant a certificate authorizing it to operate over the alternate shorter route. Many such applications have been considered by the Commission, and the desired authority has been granted whenever the Commission found that the proof met the statutory requirements. *David C. Hall, Extension*, 44 M.C.C. 104; *Interstate Dispatch, Inc., Extension*, 30 M.C.C. 763; *Dirie Freight Lines, Inc., Extension*, 29 M.C.C. 406.

One other point deserves mention. There seems to be at least a suggestion in appellant's argument that it did not *know* the limits of its operating authority and that it should no be charged with knowledge of the Commission's decisions, *supra*, in which the term "off-route point" was defined. The obvious answer to that suggestion is that this is a civil action, not a criminal prosecution, and no question as to appellant's knowledge or wilfulness is involved. It was not and is not necessary, in order to sustain the judgment of the trial court, for the evidence to show that appellant *knew* it was without authority to engage in the questioned operations. Had a criminal prosecution been brought against appellant under Section 222(a) of the Interstate Commerce Act (49 U. S. Code, 322(a)), it would have been necessary, in order to convict, to prove that appellant "knowingly and wilfully" operated without authority or beyond the scope of its authority. But Section 222(b) of the Act, under which this civil action for injunction was brought, does not require a showing of knowledge or wilfulness on the part of the offending person. There is no relevancy, therefore, in any suggestion that appellant did not know the limits of its authority and for that

reason may have exceeded them unintentionally. If it has been and is continuing to engage in unauthorized operations, even under a mistaken belief that they were authorized by its certificates, the action of the trial court in granting the injunction was proper.

CONCLUSION

We submit that under the undisputed facts and the applicable law, the appellant, in transporting property over U. S. Highway No. 30 between Boise, Idaho and Pasco, Washington, has been and is engaging in unauthorized operations, in violation of the Interstate Commerce Act, and that the judgment of the lower court enjoining appellant from continuing to engage in such operations was without error and should be affirmed.

Respectfully,

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United States Attorney

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Attorneys,

Interstate Commerce Commission

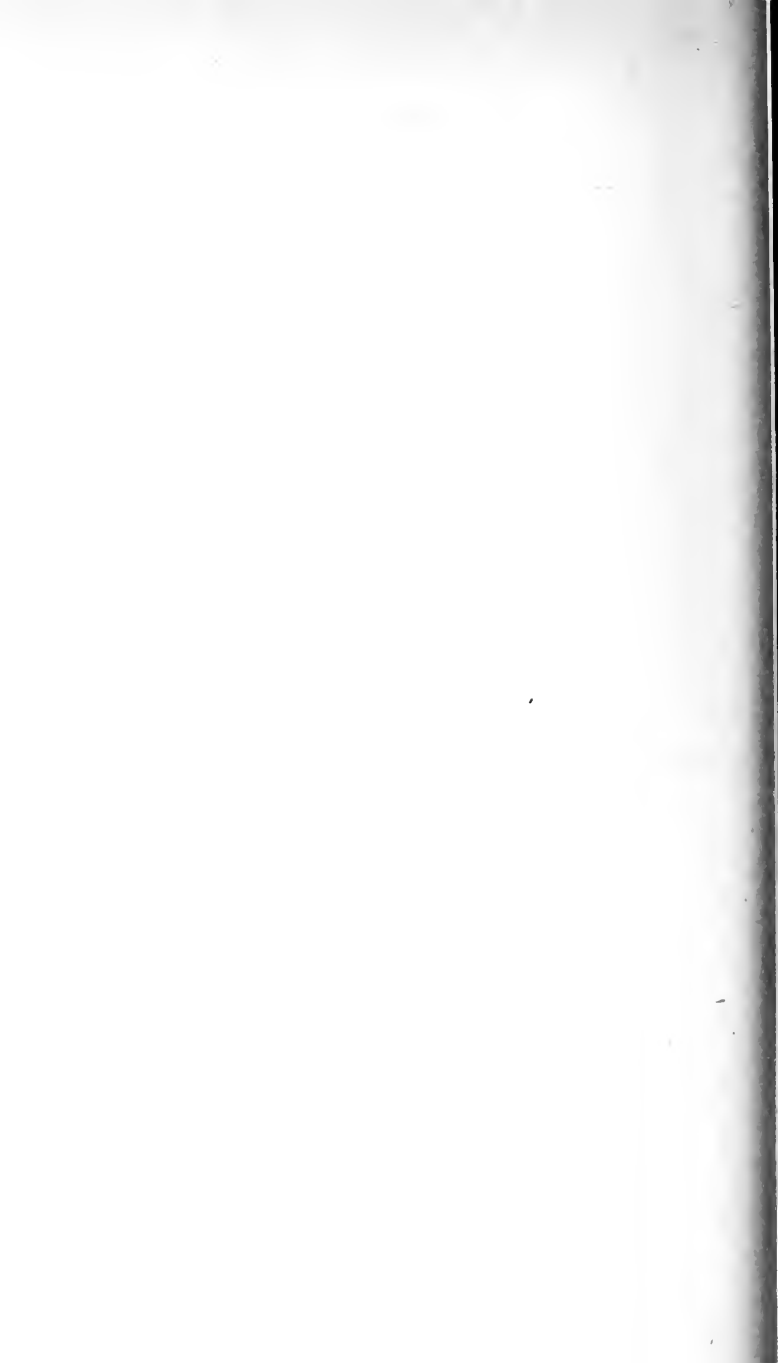
Attorneys for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon the appellant by mailing copies thereof to its attorneys of record, Messrs, Reilly and Cael, 603-604 Columbia Building, Spokane 8, Washington.

This, the _____ day of _____, 1951

Of Counsel for Appellee.



No. 12719

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED TRUCK LINES, INC., a Corporation,
Appellant.

vs.

INTERSTATE COMMERCE COMMISSION,
Appellee

Appellant's Reply Brief

*Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division*

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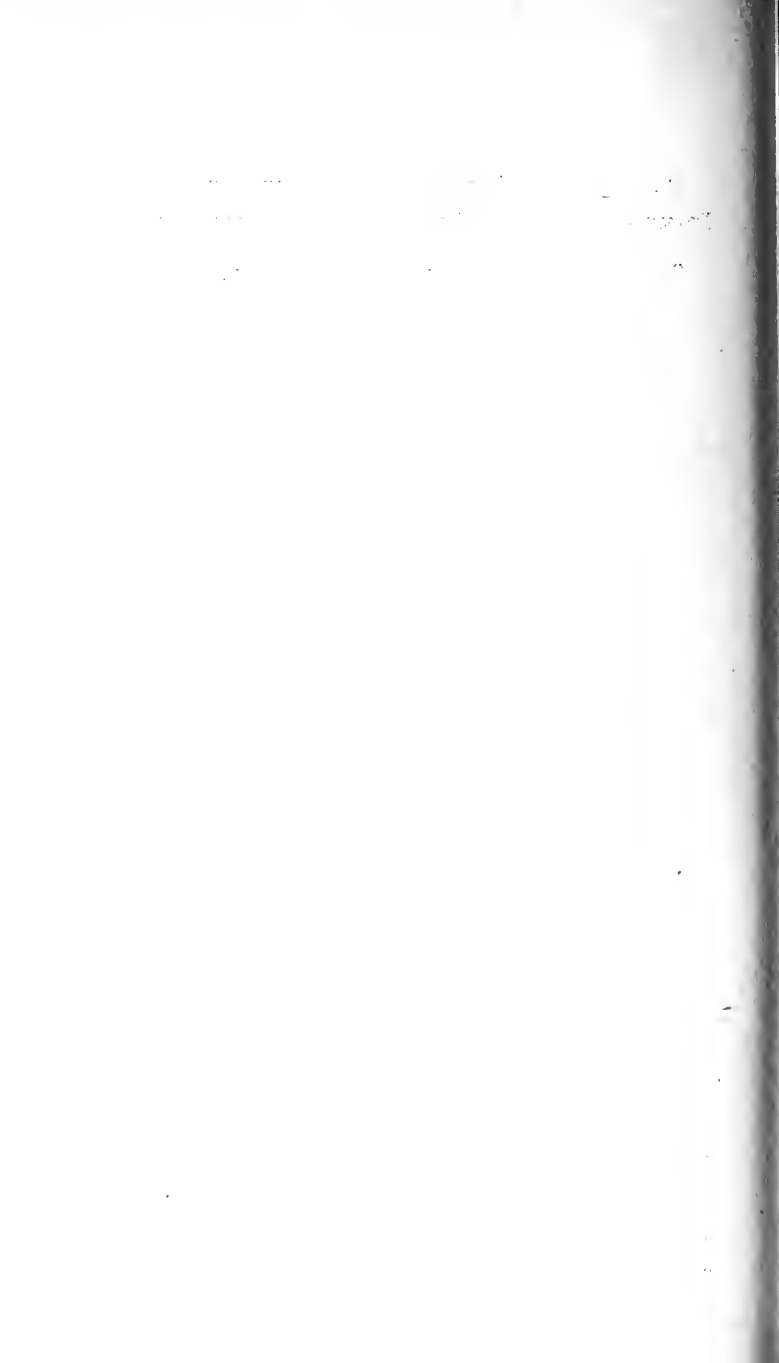
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It may be helpful to this Court for appellant to reply to the Interstate Commerce Commission's brief seriatim.

On pages 1, 2, & 3 of Appellee's Statement of Facts relative to the case, the Appellant makes no reply.

On page 4 on Appellee's proposit, The Questions at Issue, several statements are made that have no support in the record, particularly in the second paragraph, where the brief of the Appellee sets out "The sole question before the Court, therefore, is whether appellant is authorized to operate over U. S. Highway No. 30, between Boise and Pasco, (in lieu of operating over its authorized regular routes between Boise and Portland via Spokane) on the theory that Pasco is an off-route point in connection with Appellant's authorized regular route operations between Boise and Spokane."

The Interstate Commerce Commission introduced no evidence, whatsoever, at the hearing relative to any operations from Boise to Portland and it only appears from appellee's statement in its brief, on that point, Appellee is at this stage of the proceedings, attempting to interject something into its brief and bring the same before the Court, which was never raised by the Appellee before. The Appellee's contention that, that is the sole question before the Court, cannot be accepted by the Appellant. The Appellant contends that the sole question before the Court is; Has the Appellant, by virtue of its certificate MC 7746 Sub 22, the legal right to traverse U. S. Highway No. 30, from a point near Fruitland, Idaho, to a point near Pendleton, Oregon, at the junction with U. S. Highway 30 and U. S. Highway 395, in rendering service from its regular route operation Boise to Spokane, to

points and places in Grant, Lincoln, Franklin, Adams and Benton Counties, as set out in the above mentioned certificate. That, and that alone, Appellants contend is the issue before the court.

On page 5, under the title "Argument" of Appellee's brief, they set out that it is the contention of the Appellant, that Pasco is an off-route point in connection with Appellants authorized regular route operations between Portland and Spokane. The contention of the Appellant is that Pasco, as defined in Certificate No. MC 7746, is an intermediate point in Appellants regular route operation between Portland and Spokane, however, the Appellant contends that Pasco, Washington, being an intermediate point in Appellants operations Portland to Spokane, that it is also considered an off-route point by the Appellant as to Appellants regular route operations Spokane to Boise.

The fact that Pasco, Washington, being a point and place within the five counties, and also named as an intermediate point on Appellants operations Spokane to Portland, does not exclude it from being considered an off-route point in connection with Appellants authorized regular route operation Spokane to Boise.

This fact is well established and acknowledged by the Interstate Commerce Commission and more clearly established as in the case of Buckingham Transportation Company of Colorado and Fast Freight Inc. No. MC F1423, wherein Buckingham Transportation Company served Casper, Wyoming, as an intermediate point under the one certificate, and served it as an off-route, point in connection with its regular

route between Denver and Newcastle, Wyoming, via Cheyenne and Lush Wyoming.

On page 6, the Appellee again makes mention of through transportation service between Boise and Portland. The Appellee, by the use of this language seems to confuse and cloud the issue of transportation between Boise and Portland. It is not before the Court. On page 6, the Appellees set out that the rules of the Commission governing rules to territories as presented on pages 14 and 15 of Appellant's opening brief, are in no sense, rules of the Commission, nor having the force and effect of law.

In replying to that statement in Appellee's brief, the Appellant argues that, to its knowledge, they are the only rules by the Commission, wherein a carrier can receive from an employee of the Commission, any information whatsoever. As to the Commission's rulings on service to off-route points.

It can be well noted, that the rules of the Commission governing rules to territories, as set out by the Appellant on pages 14 and 15 of its opening brief, are in conflict with the theory that Appellee attempts to establish, by citing three decisions of the Interstate Commerce Commission, dealing with off-rout points, also that the same opinions are of a much later date than the decisions of the Interstate Commerce Commission, in the three cases cited.

On page 7, the Appellee refers to four Court decisions, wherein Government agencies were parties to the litigation, and in particular three cases where the Interstate Commerce Commission were parties, however, the Appellant argues that there is no relevancy whatsoever, in the decision of the

Courts in the cases cited by the Appellee, and the question before this Court.

The Appellee refers to the Commission's decisions dealing with the authority of motor carriers to serve off-route points.

In *Dixie Freight Lines, Inc. Extension Application*, 29 M. C. C. 406, the Commission stated:

An off-route point is one usually served by line-haul equipment making a short side trip and returning as soon as possible to the regular route or schedule.

In deciding the application of *System Arizona Express Service, Inc.* 4 M. C. C. 129,131, the Commission stated:

Most of the so-called off-route points in Arizona are so far off-route as to lose their status as such. An off-route point usually is one served by line-haul equipment making a short side trip and returning as soon as possible to its regular route and schedule. When asked as to the extent of departure from the regular routes in the performance of off-route service past and proposed, applicant's manager suggested that such service would relate to hauls of 150 miles from regular routes. Obviously, such service is not off-route service as that term ordinarily is used * * * The authority granted herein will include authority to serve off-route points in Arizona west of Phoenix which are between U. S. Highways 60 and 80; or which are not more than 25 miles north of U. S. Highway 60, or not more than 25 miles south of U. S. Highway 80.

Again, in *Los Angeles-Seattle M. Express Inc.*, 24 M. C. C. 141, 145, the Commission said:

San Diego, California, is situated too far distant from Los Angeles to be termed an off-route point.

Unquestionably, the Commission has rendered thousands

of decisions dealing with off-route points, and from the Commission's decisions, which are set out, it can be readily appreciated, that each and every case handled by the Commission are processed by the Commission, separately and distinctly, as in the cases above cited, and upon which the Appellee contends the Commission has established what constitutes an off-route point. The Appellant argues that it did, only insofar as that particular application before it, and that in making its decision, among other things, the Commission held, and I quote, "Authority to serve the off-route points of Sylacauga and Talladega was granted only in connection with the authorized regular route operation between Birmingham and Atlanta." It can be easily ascertained from the above quotation by the Commission, that there is no principal laid down by the Commission that is applicable to the question here before the Court, also, the Commission, in that particular instance, denied the application, as it did in the last decision cited by the Appellee on page 7.

And on page 8, the commission denied the application to serve an off-route point, and again the Commission was basing it on a single operation as it was in the two previous decisions by the Appellee.

Unquestionably, the Appellee must recognize the fact that each and every decision rendered by the Commission, in issuing a certificate, is done only on the merits of the application and all of the elements surrounding it. In the cases cited by the Appellee, certainly it can not be accepted that the Commission has established any norm or precedent in what constitutes service to an off-route point that would be applicable to the situation here before the Court. The

Interstate Commerce Commission is the exclusive agency authorized to issue authority to transport property in Interstate Commerce for compensation, and the Appellant contends that it is very obvious from the certificates held by the Applicant alone, that each and every certificate is issued only on the basis of what public convenience and necessity require.

On page 9 of Appellee's brief, a reference is made to a Rand McNally map, setting out the distances that Appellant's vehicles would have to travel in serving Pasco as an off-route point. The Appellant, from the same map, could possibly clutter this brief with hundreds of instances where it is authorized to serve points and places in the five counties over MC 7746 Sub 22, that would entail the traveling of substantially more miles over unnumbered or specified highways, and Appellant further contends that items 10 and 6 as set out in Appellants opening brief on pages 14 and 15, no longer requires a carrier, in serving an off-route point, to return over the same route to the point of its original departure. The argument advanced by the Appellee, in that particular instance, is not well founded whatsoever.

The Appellees on the same page, calls the Court's attention to the fact that the Commission has many times held that off-point authority is not severable from routes to which it is commonly appertenant. Unquestionably, the Commission has on numerable instances granted certificates to motor carriers with the restriction that certain points could not be served as off-route points. That argument by the Appellee substantiates the Appellant's conten-

tions here before the Court. in that, under Certificate MC 7746 Sub 22, the Commission did not impose any such restriction whatsoever upon the Appellant in serving all points and places in the five counties as intermediate and off-route points in connection with its otherwised regular route operations.

At the bottom of page 9, Appellees present the argument that it is not the function of the certificate to enumerate the operations that may not be performed, and cited two cases to substantiate their contention. Again, the Appellant contends that it could recite hundreds of instances where the Commission, in issuing certificates, has placed restrictions in the certificate, which forbids the carrier from performing certain operations, and in the instant case, the language by the Commission in granting certificate MC 7746, Sub 22, is clear, concise, understandable language, with no ambiguity whatsoever, authorizes the Appellant to conduct the very operation that it has been doing since the issuance of the certificate.

On page 10, the Appellees again raises the question of Pasco being an off-route point, the Appellant has already replied to that contention in this brief.

In the second paragraph, the Appellees allege the operation of the Appellant to be substantial.

It must be conceded, that the Commission certainly took into consideration the volume of business that could be anticipated before they granted to the Appellant their certificate, as it is an undeniable fact that convenience and necessity must be shown before a certificate can be obtained.

In the same paragraph, the Appellee again interjects into the case before the Court, the question of traffic from Boise to Portland, **THAT IS NOT THE QUESTION INVOLVED IN THIS PROCEEDING**, nor is the question of competition with another carrier involved in this proceeding.

On the bottom of page 10 and the top of page 11, Appellee suggests, in their language, that the Appellant should file an application to travel over the road in question. That argument advanced by the Appellee can only be considered in the light of their other reasoning.

In the George H. Blewett et al-Purchase-Hester Truck Lines, Inc. No. MC F-1521, the Commission said, among other things, quote "In our opinion. service to and from a given off-route point in connection with a regular route contemplates the use of the most direct available highway between the off-route point and the nearest point on the regular route, which in this case is Jackson, and this view is not at variance with the conclusion reached by Division 5 in the case just cited." Cited by the Commission, was Dixie Freight Lines, Inc. Extension Columbia, Ga. 29 M. C. C. 406 (2 FEDERAL CARRIERS CASES 7799). It is worthy to note, that in the Blewett case, the Vendor held a certificate to serve the off-route point of Vicksburg in connection with its regular route operations between Jackson and New Orleans. From Rand McNally map, Vicksburg is approximately 44 miles from Jackson. This certificate disputes the contention of the Appellee, as to an off-point point being a short distance from the regular route operation of a carrier.

In the instant case, Appellant, in serving the points and places in the five counties, is using the most direct

available route from its Boise-Spokane operation, and to sustain the contention of the Appellee, would, in fact, be revoking part of certificate MC 7746 Sub 22.

It is the further contention of the Appellant, that by the issuance of a certificate to a carrier, there is a contractual relationship created by the Interstate Commerce Commission and the carriers. It would be curbstone law to contend that the language used in that certificate should be interpreted strongly against the party using it (3 Williston on contracts, Section 621, Revised Addition).

It has been aptly said:

“The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them*****” Carstens Packing Co. V. United States, 62F. Supp. 525, quoting with approval United States v. Bostwick, 94 U. S. 53, 24 Law Edition 65, 66.

On the last half of page 11, Appellee seems to be under the impression, that Appellant's argument in its opening brief, intimated Appellant did not know the limits of its operating authority. The Appellant can best answer that, in that Appellant has since the time the certificate was granted, interpreted it to authorize Appellant to conduct the very operation that it is now doing, and from which Appellant contends there can be no other interpretation.

Respectfully submitted,

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